90-1738

No. _____

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1990

PACIFIC POWER & LIGHT COMPANY, et al.,
Petitioners,

v.

MONTANA DEPARTMENT OF REVENUE, et al.,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

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CONSTITUTIONAL AND STATUTORY PROVISIONS

The Supremacy Clause of the United States Constitution, article VI, clause 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Commerce Clause of the United States Constitution, article I, section 8, clause 3, provides:

> [The Congress shall have power] [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

The fourteenth amendment to the United States Constitution, section 1, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2121(a) of the Tax Reform Act of 1978, 15 U.S.C. § 391 (1982) ("Anti-Discrimination Act"), provides:

> No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For the purposes of this section a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

Section 4 of the Pacific Northwest Federal Transmission System Act, 16 U.S.C. § 838b (1982), provides:

> The Secretary of Energy, acting by and through the Administrator [of the Bonneville Power Administration] shall operate and maintain the Federal transmission system within the Pacific Northwest and shall construct improvements, betterments, and additions to and replacements of such system within the Pacific Northwest as he determines are appropriate and required to:
>
> (a) integrate and transmit the electric power from existing or additional Federal or non-Federal generating units;
>
> (b) provide service to the Administrator's customers;
>
> (c) provide interregional transmission facilities, or
>
> (d) maintain the electrical stability and electrical reliability of the Federal system: *Provided, however,* That the Administrator shall not construct any transmission facilities outside the Pacific Northwest, excepting customer service facilities within any contiguous areas, not in excess of seventy-five airline miles from said region, which are a part of the service area of a distribution cooperative which has (i) no generating facilities, and (ii) a distribution system from which it serves both within and without said region, nor shall he commence construction of any of any major transmission facility within the Pacific Northwest, unless the expenditure

of the funds for the initiation of such construction is specifically approved by Act of Congress.

Section 7(m) of the Pacific Northwest Electric Power Planning and Conservation Act of 1980, 16 U.S.C. § 839e(m) (1982), provides:

> (1) Beginning the first fiscal year after the plan and program required by section 839b(d) and (h) of this title are finally adopted, the Administrator may, subject to the provisions of this section, make annual impact aid payments to the appropriate local governments within the region with respect to major transmission facilities of the Administrator, as defined in section 3(c) of the Federal Columbia River Transmission Act --
>
> (A) which are located within the jurisdictional boundaries of such governments,
>
> (B) which are determined by the Administrator to have a substantial impact on such governments, and
>
> (C) where the construction of such facilities, or any modification thereof, is completed after December 5, 1980, and, in the case of a modification of an existing facility, such modification substantially increased the capacity of such existing transmission facility.
>
> (2) Payments made under this subsection for any fiscal year shall be determined by the Administrator pursuant to a regionwide, uniform formula to be established by rule in accordance with the procedures set forth in subsection (i) of this section. Such rule shall become effective on its approval, after considering its effect on rates established pursuant to this section, by the Federal

Energy Regulatory Commission. In developing such formula, the Administrator shall identify, and take into account, the local governmental services provided to the Administrator concerning such facilities and the associated costs to such governments as the result of such facilities.

(3) Payments made pursuant to this subsection shall be made solely from the fund established by section 11 of the Federal Columbia River Transmission System Act. The provisions of section 13 of such Act, and any appropriations provided to the Administrator under any law, shall not be available for such payments. The authorization of payments under this subsection shall not be construed as an obligation of the United States.

(4) No payment may be made under this subsection with respect to any land or interests in land owned by the United States within the region and administered by any Federal agency (other than the Administrator), without regard to how the United States obtained ownership thereof, including lands or interests therein acquired or withdrawn by a Federal agency for purposes of such agency and subsequently made available to the Administrator for such facilities.

Title 28 U.S.C. § 1341 (1982), provides:

> The district courts shall not enjoin, suspend, or restrain the assessment, levy, or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

Montana's "beneficial-use" tax statute, Mont. Code Ann. § 15-24-1203 (1989), provides (the penultimate sentence was added by the 1983 Legislature, and the last sentence was added by the 1987 Legislature):

> After March 17, 1969, there is imposed and shall be collected a tax upon the possession or other beneficial use enjoyed by any private individual, association, or corporation of any property, real or personal, which for any reason is exempt from taxation. No tax may be imposed upon the possession or other beneficial use of buildings owned by public entities and located upon public airports. However, privately owned buildings located on such airport property are subject to tax. No tax shall be imposed upon the possession or other beneficial use of public lands occupied under the terms of mineral, timber, or grazing leases or permits issued by the United States or the state of Montana or upon any easement unless the lease, permit, or easement entitles the lessee or permittee to exclusive possession of the premises to which the lease, permit, or easement relates. The tax shall be imposed upon the possession or other beneficial use of an electric transmission line and associated facilities, except that lines and facilities of a design capacity of less than 500 kilovolts shall not be subject to the tax. The tax may not be imposed upon the possession or other beneficial use of railroad right-of-way or track acquired by the state pursuant to Title 60, chapter 11, part 1, as long as the state retains ownership and the right-of-way or track is used exclusively for rail transportation.

No. 90-212
IN THE SUPREME COURT
OF THE STATE OF MONTANA
1990

PACIFIC POWER & LIGHT COMPANY,
PORTLAND GENERAL ELECTRIC COMPANY,
WASHINGTON WATER POWER COMPANY
PUGET SOUND POWER & LIGHT COMPANY
and THE MONTANA POWER COMPANY,

Plaintiffs and Appellants,

-vs-

MONTANA DEPARTMENT OF REVENUE, et al.,

Defendants and Respondents.

APPEAL FROM: District Court of the First Judicial District, In and for the County of Lewis and Clark, The Honorable Henry Loble, Judge presiding.

COUNSEL OF RECORD:

For Appellants:

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Submitted: December 6, 1990
Decided: January 10, 1991

Filed: JAN 14 1991

Clerk

Justice Diane G. Barz delivered the Opinion of the Court.

Appellants appeal an order of the First Judicial District Court, Lewis and Clark County, in a consolidated proceeding for declaratory and injunctive relief, upholding the validity of the Montana Department of Revenue's (DOR) assessment of beneficial use taxes against the appellants pursuant to § 15-24-1203, MCA. Appellants are challenging the beneficial use taxes for tax years 1985, 1986, and 1987, upon certain federally-owned 500 kilovolt (KV) transmission lines located between Townsend, Montana, and the Idaho border. The District Court granted DOR's motion for partial summary judgment on res judicata grounds and held that this Court's earlier decisions in *Pacific Power and Light Company v. Montana Department of Revenue* (1989), 237 Mont. 77, 773 P.2d 1176, and *Portland General Electric Company v. Montana Department of Revenue* (1989), 237 Mont. 324, 773 P.2d 1189, were dispositive of some of the issues before the District Court. On January 25, 1990, following trial on the remaining issues, the District Court entered an order denying the appellants' claims. The District Court held that the Colstrip Owners had not sustained the burden of proving that the assessment of the beneficial use taxes had violated any statutory or constitutional rights. We affirm.

The factual background leading up to this case has been previously set forth in *Pacific Power and Light* and *Portland General Electric* therefore, we will discuss only the facts necessary to dispose of the relevant issues.

The appellants (Colstrip Owners) are five investor-owned utilities which own undivided interests in coal-fired generating plants at Colstrip, Montana. The Colstrip Owners (Pacific Power & Light Company (PPL), Puget Sound Power & Light Company (Puget), Washington Water Power Company (WWP), Portland General Electric Company (PGE), and Montana Power

Company (MPC)), have been assessed beneficial use taxes under § 15-4-1203, MCA, for tax years 1985, 1986, and 1987 with regard to the use of the 500 KV federally-owned transmission line between Townsend and Garrison, Montana, and for tax years 1986 and 1987 with regard to the 500 KV federally-owned transmission lines between Hot Springs, Montana and the Idaho border and between Garrison and the Idaho border.

The Colstrip Owners constructed Colstrip Units 3 and 4 in 1983 and 1985 respectively. Units 3 and 4 each generate 700 megawatts of electricity for transmission west. The energy from the Colstrip units is transmitted over the Colstrip Owners' two 500 KV transmission lines to its substation at Broadview, Montana, and from the Broadview substation over the Colstrip Owners' 500 KV lines to a point near Townsend, Montana. At Townsend, the 500 KV lines interconnect with the Bonneville Power Administration's (BPA) 500 KV transmission lines. BPA constructed a substation on the Hot Springs to Idaho border 500 KV line (referred to as the "Taft substation") and a Garrison to Taft 500 KV line, to accommodate the increased energy from Colstrip Units 3 and 4. Prior to the completion of the Garrison to Taft 500 KV line, there was no interconnecting 500 KV line west from the Garrison substation. The Garrison to Taft 500 KV line became operational in October, 1985, and was declared available for service in January, 1986. Colstrip power first flowed from the Garrison substation across the Garrison to Taft line during October, 1985. At the Garrison substation, two 230 KV lines run north and interconnect with the Hot Springs substation. These 230 KV lines were known as the "bottleneck" and were the only means of transmitting power west from Garrison prior to BPA's construction of the Garrison to Taft 500 KV line.

The transmission of Colstrip energy from the Garrison substation west, is governed by a series of

agreements referred to as the "Garrison West" agreements, entered into by each of the Colstrip Owners with BPA. The transmission demands of each Colstrip Owner as set forth in their respective Garrison-West agreements served as the basis for DOR's allocation of the beneficial use tax. The total cost of the BPA transmission facilities were allocated to the Colstrip Owners as a ratio of each Colstrip Owners' transmission demand over the total capacity of the lines. This allocated cost was then multiplied by 50% and added to each Owner's respective allocated Montana value. All the Colstrip Owners were assessed the beneficial use tax on this basis for use of the Townsend to Garrison segment in tax years 1985, 1986, and 1987. Four of the Colstrip Owners (MPC was not assessed beneficial use taxes for the facilities west of the Garrison substation) were assessed the tax on this basis for the use of the Garrison to Taft substation segment of the transmission line system for tax years 1986 and 1987, and for the use of the Taft to Idaho border segment for tax years 1986 and 1987. PPL was also assessed the tax on this basis for its use of the Hot Springs to Taft transmission line system for tax years 1986 and 1987.

Appellants raise six issues on appeal:

1. Whether the District Court erred by assuming jurisdiction to decide the legality of the tax assessments prior to a final determination by the State Tax Appeals Board (STAB).

2. Whether the assessment of beneficial use taxes pursuant to § 15-24-1203, MCA, violates the Supremacy Clause of the United States Constitution by discriminating against the United States or the Colstrip Owners.

3. Whether the Colstrip Owners' previous constitutional claims are barred by the doctrine of collateral estoppel.

4. Whether the taxes assessed for tax year 1986 on the Garrison-Taft 500 KV line were unlawful or illegal.

5. Whether DOR's methodology erroneously assumes that all power transmitted west of Garrison passes over the 500 KV federal lines and thereby discriminates against interstate commerce by imposing disproportionate taxes.

6. Whether DOR's new assessment methodology (50% weighting) is unconstitutional.

The Colstrip Owners contend that the lower court could not properly evaluate the constitutional questions before it, until after STAB had made a final determination concerning the methodology and amount of the assessments. It is the Colstrip Owners' position that the taxes imposed are excessive and discriminatory and, therefore, since questions of discrimination are often questions of degree, the underlying considerations necessary to properly determine the constitutional issues were not yet decided. We disagree.

This Court has previously held that questions of "constitutional and statutory correctness" are properly decided by the courts. *Larson v. State* (1975), 166 Mont. 449, 457, 534 P.2d 854, 858. The question of whether the *tax itself* is unconstitutional bears upon the statutory language of the tax. On the other hand, the question of whether the tax is unconstitutional *as applied* pertains to the circumstances under which the tax is imposed. The interpretation of either the statutory language or the circumstances surrounding imposition of a tax is not necessarily associated with the *amount* of that tax. If we determine that a tax is unconstitutional, either on its face or as applied, such determination can certainly be made independent and apart from any analysis of whether the

tax is excessive. Therefore the constitutional issues presented by this appeal do not hinge upon the determinations STAB makes concerning the methodology and amount of the assessments.

The second issue raised by appellants is whether the 1987 amendment to § 15-24-1203, MCA, violates the Supremacy Clause of the United States Constitution, Article VI, § 2, as construed by the U.S. Supreme Court in *United States v. City of Manassas* (4th Cir. 1987), 830 F.2d 530, affirmed (1988), 485 U.S. 1017, 108 S.Ct. 1568, 99 L.Ed.2d 884. The Colstrip Owners argue that because the 1987 amendment results in exempting from beneficial use taxes State-owned property used for railroad transportation, it thereby violates the rule in *City of Manassas*.

The Fourth Circuit stated in *City of Manassas* that it is unconstitutional for States to tax users of federal property when similarly situated users of State property are exempt from taxation. *City of Manassas*, 830 F.2d at 534. The test to determine whether a State tax is unconstitutionally discriminatory was first set out by the United States Supreme Court in *Phillips Chemical Co. v. Dumas School District* (1960), 361 U.S. 376, 80 S.Ct. 474, 4 L.Ed.2d 384. The Court held that where those dealing with federal property are subject to greater use taxation than those dealing with State property, the statutory distinction "must be justified by significant differences between the two classes." *Phillips Chemical Co.*, 361 U.S. at 383, 80 S.Ct. at 479, 4 L.Ed.2d at 389. It is true that the 1987 amendment to § 15-24-1203, MCA, exempts users of State-owned rail lines from beneficial use taxes. However, after a thorough examination of the legislative history supporting this amendment, it becomes evident that there are "significant differences" between the railroads and the utilities (Colstrip Owners).

Chapter 591, 1987 Laws of Montana, was intended to exempt from beneficial use taxation two proposed tourist railroads which were to be run by non-profit corporations. See Senate Comm. on Business and Industry, Minutes on S.B. 272, 50th Leg., 4-5 (Feb. 18, 1987).

The State-owned railroad line in question had been acquired by the State as "abandoned" property under § 60-11-111, MCA, and consisted of a combined distance of thirty miles of track. The two non-profit railroads were designed to promote tourism in the form of an added attraction to parts of historic Montana.

The railroads' situation is much different than that of the Colstrip Owners. The Colstrip Owners' primary business purpose is to make a profit. The use of the federally-owned transmission lines provide the Colstrip Owners the potential to significantly increase revenues. The United States Supreme Court in *City of Detroit v. Murray Corp.* (1958), 355 U.S. 489, 78 S.Ct. 458, 2 L.Ed.2d 441, held it proper for a State to tax government property, used by a private party, in the course of the party's own business. This is precisely what is being done in this case. The Colstrip Owners are being taxed for their use of federal property. This Court has already determined that "beneficial use" does not necessarily require "physical possession, exclusive use or control of the facilities." See *Portland General Electric Co.*, at 329, 773 P.2d at 1192. Therefore, we hold that § 15-24-1203, MCA, and the 1987 amendment does not discriminate against the United States or the Colstrip Owners.

The third issue is whether the Colstrip Owners' previous constitutional claims raised in *Pacific Power and Light* 237 Mont. 77, 773 P.2d 1176, and *Portland General Electric*, 237 Mont. 324, 773 P.2d 1189, are barred by the doctrine of collateral estoppel. As we recently stated in *Smith v. Schweigert* (1990), 241 Mont. 54, 785 P.2d 195,

collateral estoppel is a form of res judicata, and whereas res judicata bars the same parties from relitigating the same cause of action, collateral estoppel bars the same parties from relitigating identical issues that have already been decided in a different cause of action. There are three elements that must be satisfied in order for collateral estoppel to apply. First, the issue must be identical to an issue that has been decided in a prior adjudication. Second, a final judgment on the merits must have been made in the prior adjudication. Third, the party against whom the plea is made must have been a party, or have privity to the party, in the prior adjudication. *Smith* at 58, 785 P.2d at 197. In applying each element in turn to the facts of this case it becomes clear that collateral estoppel should be applied. The Colstrip Owners do not dispute the fact that the previous constitutional claims raised in *Pacific Power and Light*, 237 Mont. 77, 773 P.2d 1176, for the 1984 tax year, and *Portland General Electric*, 237 Mont. 324, 773 P.2d 1189, for the 1985 tax year, are again being asserted in this litigation. The appellants now assert the identical claims for the 1985, 1986 and 1987 tax years. The fact that different tax years are being challenged makes no difference. The constitutional challenges remain the same, and it is the substance of these challenges that have failed. The year in which they were brought has no bearing upon their lack of success. Allowing the Colstrip Owners to raise the *same* challenges to the *same* tax each subsequent tax year serves no purpose. If such were the case, each new year would provide a clean slate for any and all previous claims to be readjudicated. The challenges are identical to the issues raised in the previous cases before this Court and thus satisfy the first element.

Likewise, this Court issued a final judgment with respect to those claims in *Pacific Power and Light*, 237 Mont. 77, 773 P.2d 1176, and *Portland General Electric*, 237 Mont. 324, 773 P.2d 1189, thereby satisfying the second element. That judgment was made after oral argument and at a time

much closer to our thorough consideration of the issues. Reconsideration of those issues as the Colstrip Owners would have us do, at a much later time such as now, would not be correct.

The third element is also satisfied. In both the prior cases and the case at bar, DOR is the party against whom these issues were raised. In fact, all parties in this lawsuit have been parties in the prior adjudication. Consequently, the Colstrip Owners' previous constitutional claims have been adjudicated and are barred by collateral estoppel from being raised a second time.

The fourth issue is whether the taxes assessed for tax year 1986 on the Garrison to Taft 500 KV line were unlawful or illegal. This issue will be discussed concurrently with the fifth issue, whether DOR's methodology erroneously assumes that all power transmitted west of Garrison passes over the 500 KV federal lines. Section 15-1-406, MCA, was enacted by the legislature in 1981 to provide an aggrieved taxpayer with an alternative means of challenging the imposition of a tax. Likewise, § 15-2-307, MCA, was enacted to provide an aggrieved taxpayer an alternative means of challenging the method or procedure of assessment. Under both sections a taxpayer may proceed directly to district court in the form of a declaratory judgment action. However, if a challenge is initially brought under Title 15, Chapter 2 of the MCA, pursuant to § 15-1-402, MCA, a taxpayer is required to exhaust the available administrative remedies before proceeding to the courts. See § 15-1-402 (2), MCA. The Colstrip Owners chose to bring issues four and five before STAB in accordance with Title 15, Chapter 8, MCA, and Title 15, Chapter 2, MCA, respectively. Had the issues been raised directly to district court in the form of a declaratory judgment action, they would properly be before this Court. But because these issues were initially brought before STAB, they must be first dealt with at that level.

Any decision STAB makes may be appealed through district court to this Court.

The final issue deals with a revision of assessment methodology. As the District Court stated in its denial of the Colstrip Owners' Motion for Leave to File First Amended Complaints, under § 15-8-601(3)(c), MCA, challenges to revisions in assessments must be made by appeal to STAB. The District Court correctly refused to hear this issue and, therefore, we will not hear it either. Once the issue has been brought before STAB a proper judicial review will then be available to the appellants.

The decision of the District Court is affirmed.

s/ Diane G. Barz
Justice

We Concur:

TURNAGE, C.J., and HARRISON, SHEEHY, HUNT, McDONOUGH and WEBER, JJ., concur.

IN THE SUPREME COURT
OF THE STATE OF MONTANA
NO. 90-212

PACIFIC POWER & LIGHT COMPANY, et al.,	)
Plaintiffs-Appellants,	)
v.	)
MONTANA DEPARTMENT OF REVENUE, et al.,	)
Defendants-Respondents.	)

APPELLANTS' PETITION FOR REHEARING

Appellants[1] file this Petition for Rehearing of the decision in Case No. 90-212 issued on January 10, 1991 ("Decision") pursuant to Rule 34 of Montana's Rules of Appellate Procedure. That rule provides in relevant part:

> In all other cases a petition for rehearing may be filed within 10 days after the decision of the Supreme Court has been rendered . . . . A petition for rehearing may be presented upon the following grounds and none other: That some fact, material to the decision, or some question decisive of the

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1 Plaintiffs-Appellants are Pacific Power & Light Company ("Pacific"), Portland General Electric Company ("PGE"), The Washington Water Power Company ("Water Power"), Puget Sound Power & Light Company ("Puget Sound"), and the Montana Power Company ("Montana Power").

> case submitted by counsel, was overlooked by the court, or that the decision is in conflict with an express statute or controlling decision to which the attention of the court was not directed.

Two portions of the Decision require rehearing. First, the Court made an erroneous conclusion of a critical fact, *viz.*, that the railroad companies that are exempted, pursuant to the 1987 amendment to 15-24-1203, MCA, from beneficial-use taxes notwithstanding their use of state-owned property, are nonprofit corporations. In fact, Rarus Railway Company, one of the two companies that has enjoyed and today enjoys the statutory exemption, is a for-profit entity. Second, this Court erroneously concluded that the constitutionality of both the Department's refusal to factor in the impact of tax-exempt 230-kV facilities west of Garrison and the "half at the bottom" approach--issues five and six in the Decision-- were initially presented to STAB and not to the District Court. Those issues were before the District Court long before the spring of 1988, when the Department issued its revisions that led to the commencement of the STAB process. Unfortunately, this Court's refusal to address those two constitutional questions opens the possibility of further significant delays in order to resolve the important beneficial-use tax issues in federal district court.

The Decision Relies upon an Erroneous Critical Fact

In the two earlier beneficial-use cases decided by this Court Appellants attempted to secure a decision regarding the constitutionality of the 1987 amendment 15-24-1203, MCA, under the doctrine of *United States v. City of Manassas*, 830 F.2d 530 (4th Cir. 1987), *aff'd*, 485 U.S. 1017 (1988) ("*Manassas*"). *Manassas* held that it is unconstitutional for states to tax users of federal property when similarly situated users of state property are exempt from taxation, and is based on the Supreme Court's rationale in

Phillips Chemical Co. v. Dumas Independent School Dist., 361 U.S. 376, 80 S.Ct. 474, 4 L.Ed. 2d 384 (1960) ("*Phillips*"), which held that any statutory distinction "must be justified by significant differences between the two classes." *Id.* at 383, 80 S.Ct. at 479, 4 L.Ed. 2d at 389.

In accord with *Phillips*, the Decision sought a "significant difference" to justify exemption of users of state-owned railroad property from the beneficial-use tax. It concluded that the "significant difference" was that the users of state-owned property, unlike Appellants, are nonprofit corporations. The Decision states: "The railroads' situation is much different than that of the Colstrip Owners. *The Colstrip Owners' primary business purpose is to make a profit.*" Decision at 7 (emphasis added). However, because one of the exempted railroads is in fact a for-profit entity, there is *no* "significant difference" at all.

The Department has conceded that two companies enjoy the exemption granted by the 1987 amendment to 15-24-1203, MCA: Rarus Railway Company and CMR Railroad. Department Brief at 35.[2] Appellants believe that this Court fell into error because it looked solely to the early legislative history behind the 1987 amendment to the beneficial-use tax statute, and from that legislative history

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[2] The Department stated:

> Ms. Whittinghill testified at trial that the Department had assessed beneficial use taxes against two short line railroads. (Pl. Ex. 241, Pgs. 1074-1076). Those entities were RARUS and CMR. Each railroad was assessed for beneficial use taxation until the Legislature amended 15-24-1203, MCA, during 1987.

Department Brief at 35 (footnote omitted).

erroneously concluded that Rarus and CMR railroads are both nonprofit. They are not. Before conclusively establishing that point, however, it is interesting to trace how the Court was led into such an error.

The Department's own dubious tactics are largely to blame for this confusion. Instead of developing the "nonprofit" rationale as a part of its affirmative case during trial, it was not until the briefing stage before this Court that the Department spun this theory by referring to the legislative history and the prior CMR STAB decision. *See* Respondent's Brief at 31 & 35. Of course, as Appellants pointed out in their Reply Brief, there is absolutely nothing in the text of the 1987 amendment that restricts the benefits of the 1987 amendment to nonprofit entities. Appellants' Reply Brief at 18. Indeed, a very careful reading of the Department's brief discloses that the Department did not expressly claim that nonprofit status is a prerequisite to exemption; on page 31 of its brief the Department did note that the exempted railroads were operated "for nonprofit or for tourism purposes."[3] Rather than pointing out the significance of the disjunctive "or," however, the Department then went on to stress the difference between the Colstrip Owners and the nonprofit CMR Railroad by asserting that "The Colstrip owners' dominant business motive is profit," noting in its accompanying footnote that "The Colstrip owners have a

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[3] If Appellants are allowed to present rebuttal to the Department's belated assertions of fact, they will demonstrate that the Rarus Railway Company operates 26 miles of track between Anaconda and Butte, transporting slag and copper concentrate from Anaconda and beer and coal to Anaconda. These activities are neither nonprofit nor tourism related.

fiduciary duty to maximize profits for their shareholders." Respondent Brief at 31 & n.36. Focusing solely on the CMR Railroad at this point was at best deceptive to the point of being disingenuous, for the clear implication was that nonprofit status makes a difference. To avoid misleading the Court the Department should have stated that, just like the Colstrip Owners, the Rarus Railway Company owes a duty to *its* shareholders to maximize profit; leaving the issue as it did, however, the Department led this Court into the error that nonprofit status is a prerequisite to exemption under the 1987 amendment.

The records of Montana's Secretary of State verify that Rarus Railway Company is a for-profit Montana corporation. Certified Articles of Incorporation are attached hereto as Exhibit A which Appellants respectfully request this Court to notice pursuant to Rule 201 of the Montana Rules of Evidence.[4] The legal consequence is straightforward: There is simply no "significant difference" between the Appellants and those who enjoy the benefits from use of state-owned property pursuant to the 1987 exemption. This being the case, the Court should invalidate the beneficial-use taxes imposed upon Appellants.

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[4] Secretary of State Jim Waltermire's "Certificate of Incorporation" dated March 4, 1985, recites that Articles of Incorporation of Rarus Railway Company were duly executed pursuant to the provisions of 35-1-203, MCA. That section is in the chapter governing for-profit corporations. Nonprofit corporations are covered by 35-2-101 *et seq.*

The Decision Errs by Assuming Issues Five and Six Were First Presented to STAB and Not to the District Court

The Decision states that issues five and six--discrimination against interstate commerce by the Department's failure to consider the effect of transmission over exempt 230-kV facilities, and constitutionality of "fifty percent at the bottom" approach, respectively--were initially brought before STAB and not the District Court. This is wrong. Both issues were in fact properly presented to the District Court long before the STAB proceedings were instituted, and thus this Court should provide a ruling on the merits of both claims.

The Decision characterizes issue five as follows:

> Whether DOR's methodology erroneously assumes that all power transmitted west of Garrison passes over the 500 KV federal lines and thereby discriminates against interstate commerce by imposing disproportionate taxes.

Decision at 5. This is an issue that has been part of the Garrison-West challenges since the very beginning; in fact, in *Portland General Electric Co. v. Department of Revenue*, 773 P.2d 1189 (Mont. 1989) ("*PGE*"), this Court addressed an issue quite similar to this discrimination claim.[5]

---

[5] In *PGE*, this Court overcame the claim of discrimination by noting:

> *To eliminate any influence of 230 KV lines in the assessment*, the DOR requested BPA to provide detailed information regarding the actual cost of the installed Hot Springs lines. . . .

(continued...)

Long before the spring of 1988 (when the STAB proceedings were first instituted), Appellants claimed *in all three dockets consolidated for trial and on appeal* that the imposition of the beneficial-use taxes discriminated against interstate commerce. Complaint in ADV-86-069, ¶ 26 (Jan. 1986); Complaint in ADV-87-081, ¶ 33 (Jan. 1987); Complaint in ADV-88-032, ¶ 33 (Jan. 1988). The Department's spring 1988 revisions that led to the STAB process had nothing to do with the allocation of Garrison-West capacity between taxable and nontaxable facilities, and thus the unconstitutional discrimination issue remained where it was initially--squarely in front of Judge Loble. And, as pointed out in Appellants' Reply Brief at 30, Appellants raised this issue consistently in the trial court, including in the undersigned's *opening statement*, which occurred *prior to* the STAB hearings! As a result, it was the District Court, and not STAB, that initially had to decide the claim of unconstitutional discrimination. Therefore, the Decision is in error regarding issue five.

The Decision characterizes issue six as "Whether the DOR's new assessment methodology (50 percent weighting) is unconstitutional." Decision at 5. As Mr. Van Tricht stated explicitly during oral argument, the Department first adopted the "half at the bottom" approach in 1986--long before the spring 1988 revisions that led to the STAB process. Again, the complaints in the 1986, 1987, and 1988 cases were all filed before the revisions and consequent STAB process. Judge Loble knew that this was a live issue; indeed, as he admitted in his opinion, he allowed to present "a great deal of additional evidence, *especially with regard to the fifty percent revision . . . .*" District Court Order

---

[5](...continued)

PGE, 773 P.2d at 1193 (emphasis added).

at 10. Judge Loble denied the claim not because it should have been presented to STAB but, rather, because of "lack of evidence." District Court Order at 10. Consequently, not only was the "half at the bottom" issue properly presented to Judge Loble, he appropriately assumed jurisdiction over it. It is simply wrong to assert that the issue was initially presented to STAB; in fact, it was initially presented to the District Court. Consequently, this Court should face the merits of the issue directly.

There is an even more compelling reason why the rationale of the Decision is wrong: The STAB did not entertain any constitutional questions, including issue five or issue six. Copies of the August 30, 1990, STAB decision were filed with this Court by both the Department and by Appellants. *See* Appendix A to Appellants' Reply Brief. The sole issue addressed by STAB was whether the 1986 taxes on the Garrison-Taft facilities were validly imposed--which was the major revision that initially led to invocation of the STAB process. STAB obviously declined to consider the constitutional questions contained in issues five and six during its April 1990 hearings because Judge Loble had already assumed jurisdiction over and decided those constitutional issues in his January 25, 1990 Order. As a consequence, this Court should address those constitutional issues.

Because STAB did not--indeed, could not--entertain issues five and six, it appears that the only state forum available to Appellants to obtain a ruling on the merits is this Court. As already indicated, the factual record regarding those issues is complete--both the Department and Appellants have provided evidence and analysis on each claim. If the Decision is not reheard and these two issues reconsidered, it will mean that the Montana judicial system will have deprived Appellants of an opportunity for final judicial resolution of these two significant constitutional questions. Such a result would not,

however, preclude all relief; rather, it would merely open another door that would require still further delay. Assuming possible subsequent judicial review by the U. S. Supreme Court were denied, Appellants contend that they would then be able to raise at least these two constitutional issues in federal district court. This is because federal law allows federal district courts to assume jurisdiction over state tax disputes when the state remedy is not "plain, speedy and efficient." Specifically, the Anti-Injunction Act, 28 U.S.C. § 1341 (1982), provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

The Decision's conclusion--that the Court will not consider the constitutional dimensions of issues five and six even though the issues were initially presented to the District Court long before the Department's revisions that led to the STAB process and even though the STAB could not and did not consider those issues--clearly would deprive Appellants of a plain, speedy, and efficient legal remedy in Montana courts.

Appellants have no desire to delay the ultimate resolution of these matters any further, for Appellants are aware of and sympathetic to the difficulties this litigation is causing for local taxing districts. Throughout this litigation (and often over Department objections) Appellants have sought a fast, comprehensive resolution of these important constitutional questions. However, Appellants are unwilling to surrender important constitutional questions without so much as an explanation regarding why their sincerely advanced concerns lack merit. While Judge Loble entertained those claims, he provided no rationale for his result. Unfortunately, the

Decision likewise provides no rationale. Appellants urge the Court to rehear and reconsider its refusal to address issues five and six.

For the foregoing reasons, Appellants respectfully request that this Court rehear the Decision for the purpose of correcting two important factual errors therein.

Respectfully submitted,

s/ Thomas H. Nelson
Thomas H. Nelson
James C. Paine
Donald R. Murray
Of Attorneys for Appellants

January 18, 1991

SECRETARY OF STATE
STATE OF MONTANA

Mike Cooney
Secretary of State

THE GREAT SEAL
of the
State of
Montana

Montana State
Capitol
Helena, MT 59620

CERTIFICATION
of photocopies for:

RARUS RAILWAY COMPANY

I hereby certify that the annexed is a true and complete copy of the ten page document(s) on file in this office.

DATED: January 15, 1991

s/ Mike Cooney
SECRETARY OF STATE

By s/ Florence Aimegast
Deputy

SECRETARY OF STATE
STATE OF MONTANA

CERTIFICATE OF INCORPORATION

I, JIM WALTERMIRE, Secretary of State of the State of Montana, do hereby certify that the Articles of Incorporation for the incorporation of RARUS RAILWAY COMPANY, a Montana corporation, duly executed pursuant to the provisions of Section 35-1-203, Montana Code Annotated, have been received in my office and conform to law.

NOW, THEREFORE, I, JIM WALTERMIRE, as such Secretary of State, by virtue of the authority vested in me by law, hereby issue this Certificate of Incorporation to RARUS RAILWAY COMPANY, a Montana corporation, and attach hereto a copy of the Articles of Incorporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Great Seal of the State of Montana, at Helena, the Capital, this March 4, A.D. 1985.

s/ Jim Waltermire

(GREAT SEAL)

JIM WALTERMIRE
Secretary of State

TO: THE HONORABLE JIM WALTERMIRE
Secretary of State
Montana State Capitol
Helena, MT 59620

171911
State of Montana
FILED
Sep 2 1986
Jim Waltermire
Secretary of State

Filing Fee: $5.00

STATE OF MONTANA
STATEMENT OF CHANGE OF REGISTERED AGENT OR REGISTERED OFFICE, OR BOTH, OF CORPORATION

For the purpose of having and continuously maintaining a registered agent at a registered office with the State of Montana, according to 35-1-305, 35-1-1012, 35-2-202, or 35-2-811, MCA, the undersigned submits the following statements of fact to the Secretary of State.

1. The exact name of the corporation is: RARUS RAILWAY COMPANY

2. The name of the present registered agent is: J. W. Greene

3. The name of the new registered agent is: D. M. Bisch

4. The address of the present registered office is: 300 West Commercial Avenue, Anaconda, Montana 59711

5. The address of the new registered office is: 300 West Commercial Avenue, Anaconda, Montana 59711
(Include street name and number or physical location in addition to box number with the city and zip)

6. The undersigned further states that the address of its registered office and the address of the business office of its registered agent, as changed, will be identical.

7. Such change was authorized by resolution duly adopted by its board of directors.

8. By my signature below, I, an officer of the above corporation, do state that I signed this statement on behalf of the corporation and that the statements therein contained are true, under penalty of false swearing.

Rarus Railway Company
Exact name of corporation

s/ N. A. Rustad	Secretary-Controller	8/18/86
Signature of Officer	Title of Officer	Date

ARTICLES OF INCORPORATION
FOR
RARUS RAILWAY COMPANY

The undersigned incorporators, for the purpose of forming a corporation under the Montana Business Corporation Act and the laws of Montana, hereby adopt the following articles of incorporation:

I.

NAME: The name of the corporation is RARUS RAILWAY COMPANY.

II.

DURATION: The corporation is to exist perpetually.

III.

PURPOSES: The purposes for which the corporation is organized are to own, operate and maintain railroads and railroad equipment and facilities in the state of Montana and intestate commerce in the United States; to engage in any lawful act or activity for which a corporation may be organized under the laws of the state of Montana, except for the purpose of banking or insurance.

IV.

REGISTERED OFFICE AND AGENT: The street address of the initial registered office of the corporation in the state of Montana, is at 300 W. Commercial, Anaconda, Montana, 59711, and the name of its initial registered agent as such address is J. W. Greene.

V.

DIRECTORS: The number of directors constituting the initial board of directors shall be seven (7), and the names and addresses of the persons who are to serve as directors until the first annual meeting of shareholders or until their successors are elected and qualified are:

J. W. Greene, Star Route East, Anaconda, Montana 59711;
Anna Rose Greene, Star Route East, Anaconda, Montana 59711;
David M. Bisch, 2010 W. Park Avenue, Anaconda, Montana 59711;
Marilou Bisch, 2010 W. Park Avenue, Anaconda, Montana 59711;
William T. McCarthy, 1117 W. Third, Anaconda, Montana 59711;
Chieko McCarthy, 1117 W. Third, Anaconda, Montana 59711;
William R. Tait, 2509 Phillips, Butte, Montana 59701.

The number of directors which shall constitute the whole board of directors shall be such as from time to time shall be fixed by, or in the manner provided in, the bylaws, but in no case shall the number be less than five (5).

VI.

INCORPORATORS: The names and addresses of the incorporators of this corporation are:

J. W. Greene, Star Route East, Anaconda, Montana 59711
William T. McCarthy, 1117 W. Third, Anaconda, Montana 59711
David M. Bisch, 2010 W. Park Avenue, Anaconda, Montana 59711.

VII.

POWERS: To have and to exercise all the powers now or hereafter conferred by the laws of the state of Montana upon corporations; to do all and everything necessary, suitable, or proper for the accomplishment of any of the purposes or the attainment of any of the objectives, or the exercise of any of the powers herein set forth or authorized by law.

VIII.

CAPITAL STOCK: The corporation is authorized to issue One Thousand (1,000) shares of capital stock of the par value of One Hundred Dollars ($100.00) per share. The stock of the corporation is and shall be non-assessable without appropriate action by the stockholders of the corporation.

IN WITNESS WHEREOF, these articles of incorporation have been executed by the directors and incorporators named herein this *28th* day of *February*, 1985.

s/ I. W. Greene

s/ W. T. McCarthy

s/ D. M. Bisch

SECRETARY OF STATE

STATE OF MONTANA

CERTIFICATE OF MERGER

I, JIM WALTERMIRE, Secretary of State of the State of Montana, do hereby certify that the Articles of Merger of RARUS, INC., a Montana corporation, into RARUS RAILWAY COMPANY, a Montana corporation, the surviving corporation, duly executed pursuant to the provisions of Section 35-1-805, Montana Code Annotated, have been received in my office and conform to law.

NOW, THEREFORE, I, JIM WALTERMIRE, as such Secretary of State, by virtue of the authority vested in me by law, hereby issue this Certificate of Merger to RARUS RAILWAY COMPANY, a Montana corporation, and attach hereto a copy of the Articles of Merger.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Great Seal of the State of Montana, at Helena, the Capital, this December 31, A.D. 1986.

s/ Jim Waltermire

(GREAT SEAL)

JIM WALTERMIRE
Secretary of State

ARTICLES OF MERGER PURSUANT TO SECTION 35-1-804, MONTANA CODE ANNOTATED OF RARUS, INC.

Pursuant to the provisions of § 35-1-804, Mont. Code Ann., the undersigned corporation hereby adopts the following articles of merger for the purpose of merging Rarus, Inc. into Rarus Railway Company, a Montana corporation, which will be the surviving corporation.

FIRST: The plan of merger is that Rarus, Inc. would be merged into Rarus Railway Company with Rarus Railway Company the surviving corporation. The outstanding shares of stock of Rarus, Inc. would be redeemed and cancelled and Rarus Railway Company would then issue 100 shares of stock to the shareholders of Rarus, Inc. whose shares were redeemed. The 100 shares of stock of Rarus Railway Company would be issued as follows: 33.4 shares issued to J. W. Greene; 33.3 shares issued to David M. Bisch and 33.3 shares issued to William T. McCarthy.

There will be no changes in the articles of incorporation of Rarus Railway Company, the surviving corporation as a result of the proposed merger.

It is not possible to effectuate the purposes for which Rarus, Inc. was incorporated, i.e., to performing the planning, layout and construction of all types of railroad facilities, including, but not limited to, roadbeds, ballast, ties, trackage, bridges, culverts, roads, loading and unloading facilities and to repair, maintain and rebuild all types of railroad equipment and rolling stock. Therefore, it is necessary to merge Rarus, Inc. into Rarus Railway Company pursuant to the merger.

SECOND: The number of shares outstanding of Rarus, Inc. is 100 shares. 100 shares voted in favor of the

plan of merger and 0 shares voted against the plan of merger.

THIRD: A resolution was unanimously adopted by the board of directors of Rarus, Inc. approving a plan of merger. The resolution was adopted by the board of directors at a special meeting of the board of directors on December 30, 1986.

FOURTH: The shareholders of Rarus approved the plan of merger at a special meeting on December 30, 1986.

DATED this 30th day of December, 1986.

RARUS, INC.

By s/ D. M. Bisch
David M. Bisch, President

ATTEST:

s/ Marilou Bisch
Marilou Bisch, Secretary

STATE OF MONTANA)
: ss.
County of Silver Bow)

On this 30th day of December, 1986, before me, a Notary Public for the State of Montana, personally appeared David M. Bisch and Marilou Bisch, known to me to be the president and secretary of Rarus, Inc. respectively

whose names are subscribed to the within instrument and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my notarial seal the day and year in this certificate first above written.

s/ J. Richard Orizotti
Notary Public for the State of Montana
Residing at Butte, Montana
My Commission Expires: 11/10/87

ARTICLES OF MERGER PURSUANT TO SECTION 35-1-804, MONTANA CODE ANNOTATED OF RARUS RAILWAY COMPANY

Pursuant to the provisions of § 35-1-804, Mont. Code Ann., the undersigned corporation hereby adopts the following articles of merger for the purpose of merging Rarus, Inc. into Rarus Railway Company, a Montana corporation, which will be the surviving corporation.

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There will be no changes in the articles of incorporation of Rarus Railway Company, the surviving corporation as a result of the proposed merger.

It is not possible to effectuate the purposes for which Rarus, Inc. was incorporated, i.e., to performing the planning, layout and construction of all types of railroad facilities, including, but not limited to, roadbeds, ballast, ties, trackage, bridges, culverts, roads, loading and unloading facilities and to repair, maintain and rebuild all types of railroad equipment and rolling stock. Therefore, it is necessary to merge Rarus, Inc. into Rarus Railway Company pursuant to the merger.

SECOND: The number of shares outstanding of Rarus Railway Company is 80 shares. 80 shares voted in favor of

the plan of merger and 0 shares voted against the plan of merger.

THIRD: A resolution was unanimously adopted by the board of directors of Rarus Railway Company approving a plan of merger. The resolution was adopted by the board of directors at a special meeting of the board of directors on December 30, 1986.

FOURTH: The shareholders of Rarus approved the plan of merger at a special meeting on December 30, 1986.

DATED this 30th day of December, 1986.

Rarus Railway Company

By s/ D. M. Bisch
David M. Bisch, President

ATTEST:

s/ Norman Rustad
Norman Rustad, Secretary-Controller

STATE OF MONTANA)
: ss.
County of Silver Bow)

On this 30th day of December, 1986, before me, a Notary Public for the State of Montana, personally appeared David M. Bisch and Norman Rustad, known to me to be the president and secretary of Rarus Railway

Company respectively whose names are subscribed to the within instrument and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed my notarial seal the day and year in this certificate first above written.

s/ J. Richard Orizotti
Notary Public for the State of Montana
Residing at Butte, Montana
My Commission Expires: 11/10/87

TO: THE HONORABLE JIM WALTERMIRE
Secretary of State
Montana State Capitol
Helena, MT 59620

218023
State of Montana
FILED
May 27, 1988
Jim Waltermire
Secretary of State

Filing Fee: $5.00 60301

STATE OF MONTANA
STATEMENT OF CHANGE OF REGISTERED AGENT OR

REGISTERED OFFICE, OR BOTH, OF CORPORATION

For the purpose of having and continuously maintaining a registered agent at a registered office with the State of Montana, according to 35-1-305, 35-1-1012, 35-2-202, or 35-2-811, MCA, the undersigned submits the following statements of fact to the Secretary of State.

1. The exact name of the corporation is: RARUS RAILWAY COMPANY

2. The name of the present registered agent is: D. M. Bisch

3. The name of the new registered agent is: W. T. McCarthy

4. The address of the present registered office is: 300 West Commercial Avenue, Anaconda, Montana 59711

5. The address of the new registered office is: 300 West Commercial Avenue, Anaconda, Montana 59711
(Include street name and number or physical location in addition to box number with the city and zip)

6. The undersigned further states that the address of its registered office and the address of the business office of its registered agent, as changed, will be identical.

7. Such change was authorized by resolution duly adopted by its board of directors.

8. By my signature below, I, an officer of the above corporation, do state that I signed this statement on behalf of the corporation and that the statements therein contained are true, under penalty of false swearing.

RARUS RAILWAY COMPANY
Exact name of corporation

s/ N. A. Rustad	Secretary-Controller	5/26/88
Signature of Officer	Title of Officer	Date

IN THE SUPREME COURT OF THE STATE OF MONTANA

NO. 90-212

PACIFIC POWER & LIGHT CO., PUGET SOUND POWER & LIGHT CO., THE WASHINGTON WATER POWER COMPANY, PORTLAND GENERAL ELECTRIC CO., AND MONTANA POWER CO., Plaintiffs and Appellants, v. THE DEPARTMENT OF REVENUE OF THE STATE OF MONTANA, et al., Defendants and Respondents.	FILED FEB 14 1991 Ed Smith Clerk of Supreme Court State of Montana ORDER

The petition for rehearing is denied.

DATED this 14th day of February, 1991.

TURNAGE, C.J., and HARRISON, BARZ, HUNT, McDONOUGH, WEBER, AND SHEEHY, JJ., concur.

MONTANA FIRST JUDICIAL DISTRICT COURT

LEWIS AND CLARK COUNTY

PACIFIC POWER AND LIGHT COMPANY, et al.,	)	Cause Nos.
	)	ADV-86-069
Plaintiffs,	)	ADV-87-081
	)	ADV-88-032
- vs -	)	
	)	ORDER
THE DEPARTMENT OF REVENUE OF THE STATE OF MONTANA, et al.,	)	
Defendants.	)	

Cause Nos. CDV-86-069, ADV-87-081, and ADV-88-032 constitute this consolidated proceeding for declaratory and injunctive relief brought under Section 15-1-406, MCA, and Title 27, Chapter 8, MCA. Plaintiffs are seeking a determination of the validity of the beneficial use tax set forth in Section 15-24-1203, MCA, which has been assessed against them for the years 1986 and 1987 with regard to the 500 kV transmission lines between Hot Springs, Montana and the Idaho border and between Garrison and Taft, Montana. Also originally included in this case was the question of the validity of the imposition of the beneficial

use taxes upon Plaintiffs for their use of the Townsend to Garrison 500 kV transmission line system and facilities for tax years 1985, 1986, and 1987. This Court determined that imposition of such taxes was valid when it granted Defendants' motion for summary judgment in November 1988.

Plaintiffs are 1) Pacific Power and Light Company (Pacific), an assumed business name for the electric utility operations of PacifiCorp, a Maine corporation which provides retail electric utility service to customers located in Oregon, Washington, Wyoming, California, Idaho, and Montana; 2) Puget Sound Power and Light Company (Puget), a Washington corporation which provides retail electric utility service to customers located in the western Washington area; 3) Portland General Electric Company (PGE), an Oregon corporation which provides retail electric utility service to customers located in Oregon; 4) Washington Water Power Company (Washington Water), a Washington corporation which provides retail electric utility service to customers located predominately in Washington and Idaho; and 5) the Montana Power Company (MPC), a Montana corporation which provides retail electric service to customers located in Montana. MPC and Puget own an undivided interest in Colstrip Units 1 and 2. Each Plaintiff owns an undivided interest in Colstrip Unit 3, and four of the five Plaintiffs own an undivided interest in Colstrip Unit 4. Collectively, Plaintiffs are referred to as the "Colstrip Owners."

Defendants are the Montana Department of Revenue (DOR), an administrative agency of the state of Montana charged with administering the tax laws of the state of Montana; the counties of Jefferson, Broadwater, Powell, Granite, Missoula, Mineral, and Sanders, political subdivisions for the state of Montana; the treasurers of the above counties, Susan Miller, Irene Kemmer, Dalice M. Cook, Harriet L. Ryan, Fern Hart, Billye An Bricker, and

June Thayer; and Ed Argenbright (now Nancy Keenan), the State Superintendent of Public Instruction.

Most of the background for this case is the same as that set forth on pages 3 - 22 of this Court's order in Cause No. 50978 dated December 21, 1987 which was affirmed by the Montana Supreme Court in *Pacific Power and Light v. Montana Department of Revenue*, ___ Mont. ___, 773 P.2d 1176, 46 St. Rep. 636 (1989) and on pages 2-9 of this Court's order in Cause No. ADV-86-200 dated January 19, 1988 which was affirmed by the Montana Supreme Court in *Portland General Electric Company v. Montana Department of Revenue* ___ Mont. ___, 773 P.2d 1189, 46 St. Rep. 839 (1989). In *Portland General Electric*, the Montana Supreme Court set forth some of the background of this case as follows:

> In 1986, anticipating the completion of Colstrip Unit IV, the BPA, at the request of the Colstrip Owners, completed the Garrison-West lines connecting the Garrison substation to the Taft, Montana, substation and points to the west. Prior to the completion of the Garrison-Taft 500 kV transmission lines, the Hot Springs-Dworshak lines were the only existing 500 kV lines providing access to the west.
>
> From the BPA substation at Garrison, Montana, the transmission of Colstrip power is governed by separate contracts, commonly referred to as the Garrison-West Agreement. These contracts continue for a period of 22 years, with a right to renew at comparable terms. Under each Owners' separate contract with the BPA, power would be introduced at the Garrison substation and transmitted across the entire BPA "main grid" which included both 230 and 500 kV lines. Notably, appellant [PGE] entered into no other agreement for the transmission of its Colstrip power to points west.

Under the terms of PGE's agreement with the BPA, PGE requested BPA provide adequate transmission facilities west of Garrison, Montana, to transmit power on a firm basis over the Federal Transmission System to PGE's system load at the Pearl Substation in Oregon. [Other plaintiffs had different delivery points.] PGE made available and BPA was required to accept scheduled power not to exceed the reserved transmission demand set forth on Exhibit D of the Garrison-West Agreement. Exhibit D provided that from the date of commercial operation of Colstrip Unit III until the date when the 500 kV transmission line connecting Garrison to the Federal 500 kV Transmission System first became available for scheduling power (the Garrison-Taft lines), the transmission demand for PGE was zero. However, a footnote to Exhibit D provided for the five Colstrip owners to allocate BPA's available 330 megawatts transmission capacity.

At this point, a brief explanation describing the 330 megawatt limitation is in order. From the Garrison substation to points west, the BPA lacked transmission line capacity to accommodate full transmission of Colstrip power to the Owners' individual system loads. This lack of transmission capacity is due to a gap in the 500 kV lines between the Garrison substation and the Hot Springs substation, referred to in this litigation as the "bottleneck." Between the two substations, the BPA had only 230 kV lines, which proved insufficient to accommodate the total scheduled Colstrip power. Recognizing its inability to fulfill obligations under the Garrison-West Agreements, the BPA imposed a 330 megawatt limitation upon the amount of power which could be scheduled west of the Garrison

substation, until the Garrison-Taft 500 kV lines were completed.

DOR prepared a beneficial use tax assessment for each of the Colstrip Owners' interest in the Garrison-Taft and the Hot Springs-Border 500 kV transmission lines for the tax years 1986 and 1987. DOR used the unit valuation method in arriving at its assessment. The unit approach to valuation utilizes three indicators to obtain a value: the cost indicator, the income indicator, and the market or stock and debt indicator. Through the cost indicator, DOR tried to get an idea of the physical cost of the property. First, DOR obtained the cost of the specific line for a specific year. Then, DOR allocated the cost to the Owners by relying on the Owners' transmission demands set forth in their Garrison-West Agreements. For example, BPA reported that the cost of the Garrison-Taft line for 1986 was $184,742,794. Washington Water's transmission demand was 393,000 out of a total transmission line capacity of 1,915,000 or 20.52% of total transmission. This percentage of 20.52 multiplied by the total cost of $184,742,794 resulted in an allocated cost to Washington Water of $39,032,969. In its initial assessment of Garrison-Taft for 1986, DOR integrated this allocated cost into Washington Water's individual cost indicator and then weighted the entire cost indicator by 40%. [In Cause Nos. 50978 and ADV-86-200, DOR also integrated the allocated cost into each owner's individual cost indicator and then weighted the entire cost indicator by 40%.]

DOR subsequently issued revised assessments in which the allocated cost was *first* multiplied by *50%* and then added to the allocated Montana value as an *additive*. Plaintiffs resisted Defendants' motion for summary judgment with regard to imposition of taxes for use of the Townsend-Garrison line for tax years 1985, 1986, and 1987 on the basis that the 50% additive was different than the 40% solution used in Cause Nos. 50978, ADV-86-200, and in

the initial assessments in this consolidated case. Plaintiffs argued:

> This Court explicitly relied upon "the 40 percent solution" in its Order upholding the Department's imposition of taxes on the Colstrip Owners in that cause [50978]. . . . In subsequent years, however, the Department's methodology flip-flopped; *now* the Department first determines each utility's unit value *without* the beneficial use property and then adds 50 percent of the cost of the federal facilities before allocating value to Montana. "The 40 percent solution" has gone by the wayside.

In granting Defendants' motion for summary judgment, this Court stated: "[T]his Court recognized the forty percent solution while addressing Count 1 of Plaintiffs' complaint, the supremacy clause claim. This Court did not 'explicitly rely' on the forty percent solution in such order." This Court also held that the difference between the forty and fifty percent methodologies was not a genuine issue of material fact.

Plaintiffs also attempted to amend their complaints on the basis of DOR's revisions. However, in their brief in support, Plaintiffs repeatedly admitted that:

> assessment revisions may be challenged only by appeal to the State Tax Appeal Board.

(Plaintiffs' Brief filed July 8, 1988, p. 1, ll. 22-23)

> [t]he sole manner for challenging revisions is by appeal to STAB under 15-8-601(3)(c), MCA. . . .

(*Id.* at p. 2, ll. 23-25)

> Again, because the sole route for challenging revisions to assessments is to go to STAB, . . . it appears clear that STAB has exclusive jurisdiction first to review these arguments.

(*Id.* at p. 5, ll. 1-5)

This Court agreed with Plaintiffs that under Section 15-8-601(3)(c), MCA, STAB has jurisdiction over Plaintiffs' challenges to DOR's revisions in assessments. Therefore, Plaintiffs' motion to amend its complaints in order to add such challenges was denied.

Plaintiffs stated that they did appeal the revised assessments to STAB on five separate grounds:

> 1. [T]he revisions employed an incorrect depreciation period.
>
> 2. [DOR] taxed those facilities as if they had been in operation all year.
>
> 3. [T]he Department made a factual error . . . [which] was caused by its misreading of BPA Garrison-West contracts in effect on the assessment date; the Department incorrectly assumed that the "reserved transmission demands" . . . were at the maximum amount as of December 31, 1985.
>
> 4. [T]he Department's revisions tax the Colstrip Owners as if *all* Colstrip power were flowing over the Garrison-Taft 500 kV facilities and *none* were flowing over the 230 kV federal facilities west of Garrison.
>
> 5. [T]he Department's treatment of the federal facilities as "Class Eleven" property was

> erroneous, for Montana statutes establish that those facilities should be taxed as "Class Four" property.

(Plaintiffs' Brief in Support of Plaintiffs' Motion for Stay)

Arguing that "each of these five specifications of error involve[d] factual determinations regarding value and methodology, as opposed to pure questions of law," Plaintiffs filed a motion to stay requesting that this Court "postpone hearing the legal questions related to such values until after STAB decides the underlying factual and methodological issues." Plaintiffs' motion was denied on the basis that 1) there were no legal questions with regard to Plaintiffs' valuation claims pending before this Court; 2) this Court, not STAB, is the finder of fact with regard to the beneficial use tax cases; and 3) this Court does not have jurisdiction to address the appropriateness of any valuation.

Although Defendants' motion for summary judgment was granted and Plaintiffs' motion to amend and motion to stay were denied, Plaintiffs were allowed to present evidence concerning the subject matter of those motions insofar as it even tangentially applied to the claims set forth in this case.

The law applicable to this case was established by the Montana Supreme Court in *Pacific Power* and *Portland General Electric*. Under the doctrine of stare decisis "a deliberate or solemn decision of the court made after argument on a question of law fairly arising in the case, and necessary to its determination, is . . . *binding precedent . . . in other courts of lower rank in subsequent cases where the very point is again in controversy.*" [Emphasis supplied] *Black's Law Dictionary*, 1261 (rev. 5th ed. 1979). In *State ex rel. Sparling v. Hitsman*, 99 Mont. 521, 525, 44 P.2d 747, 749 (1935), the Montana Supreme Court explained the purpose of the doctrine, as follows:

> We realize the force and the wisdom of the rule of stare decisis. We are not unmindful of the fact that principles of law should be positively and definitely settled in order that courts, lawyers and, above all, citizens may have some assurance that important legal principles involving their highest interests shall not be charged from day to day, with the resultant disorders that of necessity must accrue from such changes.

This Court *must follow and adhere to principles of law established in Pacific Power and Portland Gen. Elec.*

Plaintiffs set forth eight counts alleging that the imposition of the beneficial use tax is illegal. (In CDV-86-69, Plaintiffs set forth only seven of the eight counts.) All of the counts are the same or very similar to the seven counts set forth in Cause No. 50978 and the eight counts set forth in Cause No. ADV-86-200, both of which have been affirmed by the Montana Supreme Court. Thus, both opinions are equally applicable to the eight counts raised in these consolidated cases. This Court realizes that Plaintiffs presented a great deal of additional evidence, especially with regard to the fifty percent revision, the issues presented to STAB and those contained in their motions to amend and to stay. However, none of this evidence convinces this Court to change any of its earlier orders in this case nor to adjust any of the reasoning therein. In addition, none of this evidence proves Plaintiffs' claims in this consolidated case. Thus, due to lack of evidence proving Plaintiffs' claims and also in light of this Court's opinion in Cause No. 50978 as affirmed by *Pacific Power* and this Court's opinion in Cause No. ADV-86-200 as affirmed by *Portland General Electric*, this Court finds that Plaintiffs have not sustained their burden of proving that the imposition of beneficial use taxes pursuant to Section 15-24-1203, MCA, violates any statutory

or constitutional rights. Therefore, this Court finds that such taxes have been lawfully imposed. Such taxes shall be disbursed from the protest accounts in which they are presently being held and shall be distributed as per Section 15-1-402, MCA.

IT IS SO ORDERED.

DATED this 25th day of January, 1990.

s/ Henry Loble
DISTRICT COURT JUDGE

pc: Counsel of Record

**PACIFIC POWER & LIGHT COMPANY,
Puget Sound Power & Light Company,
Portland General Electric Company,
Washington Water Power Company,
and the Montana Power Company,
Plaintiffs and Appellants,**

v.

**MONTANA DEPARTMENT OF REVENUE, et al.,
Defendants and Respondents.**

No. 88-151.

Supreme Court of Montana.

Submitted Feb. 21, 1989.

Decided April 17, 1989.

Rehearing Denied June 1, 1989.

Donald R. Murray, Murphy, Robinson, Heckathorn and Phillips, Kalispell, Thomas H. Nelson, Stoel, Rives, Boley, Jones & Grey, Portland, Or., for plaintiffs and appellants.

Larry Schuster, Montana Dept. of Revenue, Property Tax Div., Helena, for defendants and respondents.

GULBRANDSON, Justice.

Appellants appeal the order of the First Judicial District Court, Lewis and Clark County, in a declaratory judgment action, upholding the validity of the Montana Department of Revenue's (DOR) assessment of beneficial use taxes for the year 1984 against the appellants pursuant to § 15-24-1203, MCA. These beneficial use taxes were assessed for the appellants' firm transmission demands

upon certain Bonneville Power Administration (BPA), 500 kilovolt (KV) transmission lines located between Townsend, Montana and Garrison, Montana. We affirm the order of the District Court.

In the mid-1970s, two mine-mouth, coal-fired electric generating plants were built by Montana Power Company (MPC) and Puget Sound Power and Light Company (Puget), at Colstrip, Montana. Each of these plants produce 330 megawatts of electrical power consuming 30 megawatts internally at each plant. These plants have been operated and maintained by the Montana Power Company since being placed in service in 1975 and 1976.

To market the power produced by Colstrip Units I and II, two 230 KV electrical transmission lines were built to transmit the power from Colstrip to a point near Broadview, Montana. Other 230 KV lines moved the energy from Broadview to markets or "loads" located in western Montana and the Pacific Northwest. This system of 230 KV lines proved adequate for transmitting the energy generated from Colstrip Units I and II.

In the late 1970s and early 1980s, MPC and Puget, in conjunction with Portland General Electric Company (PGE), Washington Water Power Company (WWP) and Pacific Power and Light Company (PPL) foresaw an increased demand in the Pacific Northwest for electrical power. Consequently, they decided to build Colstrip Units III and IV. (Colstrip Units III and IV each have a generation capacity of 770 megawatts (MW) of electrical power with each plant consuming approximately 70 MW internally.) These five companies, the appellants in this case, were the owners of undivided interests in Colstrip Units III and IV at the time of the assessment of the beneficial use taxes which are the subject of this litigation. They shall hereinafter be collectively referred to as the Owners.

Realizing that the existing system of 230 KV transmission lines would be insufficient to transmit the additional 1,400 MW produced by Colstrip Units III and IV in 1977, the Owners entered into negotiations with the BPA to build two 500 KV transmission lines from Townsend to the BPA's existing 500 KV lines at Taft, Montana.

The Owners would convert the existing 230 KV lines stretching from the Colstrip generating point to a substation located at Broadview, Montana, into 500 KV lines. They then would construct new 500 KV lines from Broadview, Montana to the anticipated BPA 500 KV lines beginning in Townsend.

For its part, the BPA executed two primary agreements with the Owners. These agreements stated the BPA would construct and operate those 500 KV lines referred to as the Montana Intertie line, which runs from Townsend, Montana to Garrison, Montana, and the Garrison West line, which runs from Garrison, Montana, to a point designated as the Taft substation on the Montana-Idaho border. These lines would link with the BPA's currently existing 500 KV system at the Taft substation.

In preparation for Colstrip Unit III going on-line in January, 1984, the BPA completed construction of the 500 KV lines from Townsend, Montana to Garrison, Montana, in 1983. There is no substation at the point where the BPA and Owners' lines meet near Townsend. The BPA completed the Garrison West line in 1986. This facilitated the transmission of Colstrip Unit IV power to the Taft substation and points to the west.

In 1983, the Montana Legislature, realizing use of the proposed BPA 500 KV lines extending from Townsend to Taft would be exempt from state property taxes, passed an

amendment to § 15-24-1203, MCA, to close the loophole which provided this tax windfall. The amendment provides for the assessment of a beneficial use tax against users of exempt electrical transmission lines having a 500 KV or greater rating. After passage of this amendment, the DOR begin meeting with the Owners, their representatives and the BPA to determine a value for the Montana Intertie line which would be placed in service in 1984.

A definite value for the Montana Intertie line had not been established by early 1984. The DOR thus based its assessment on the average of the initial agreement's project value and estimates of the actual cost of constructing these lines. The resulting value for the Montana Intertie line was established at $92,000,000. The DOR then factored this value into the cost portion of the standard unitary method and assessed taxes to each owner based upon their firm transmission demands under the Montana Intertie Agreement. The Owners protested the imposition of these beneficial use taxes and this lawsuit resulted.

In 1985 and each subsequent year, the DOR has assessed beneficial use taxes against the Owners for their use of the 500 KV lines referred to in this opinion and in each case the Owners have protested and filed lawsuits seeking declaratory injunctive relief from the imposition of those taxes. The individual facts of those cases are not dealt with in this opinion.

The Owners present seven separate issues in this appeal:

1. Whether the Owners' lacked that sufficient "Beneficial Use" of the subject facilities necessary for the imposition of beneficial use taxes under § 15-24-1203, MCA?

2. Whether the challenged taxes violate the Commerce Clause of the United States Constitution?

3. Whether the challenged taxes violate the Supremacy Clause of the United States Constitution?

4. Whether the challenged taxes violate the guarantee of due process and equal protection found in the Fourteenth Amendment?

5. Whether the challenged taxes violate the "Private Interests" clause of the Montana Constitution?

6. Whether the challenged taxes violate the "Retrospective Laws" clause of the Montana Constitution?

7. Whether the challenged taxes violate the "Impairment of Obligation of Contracts" clause of the Montana Constitution?

BENEFICIAL USE

A state's right to impose beneficial use taxes on a private citizen or corporation's possession or use of property owned by the United States is well established. *United States v. County of Fresno* (1977), 429 U.S. 452, 462, 97 S.Ct. 699, 704, 50 L.Ed.2d 683, 692. However, these taxes must be imposed equally on others similarly situated. *Id.* at 462, 97 S.Ct. at 705, 50 L.Ed.2d at 692. The policy reason for allowing these taxes is to prevent the unfair trade advantage accruing to those private users of exempt properties over their competitors who must pay *ad valorem* taxes on similar, privately held properties. *Id.* at 463, 97 S.Ct. at 705, 50 L.Ed.2d at 692-693.

The Owners maintain that the beneficial use taxes may not be imposed upon them as they do not have a beneficial

interest in or receive a beneficial use from the 500 KV lines. They contend in order to impose beneficial use taxes the state must show that the Owners have possession of the exempt property and that this possession is exclusive, excluding other users of the lines and restricting physical access to the property. As evidence of their lack of possession or exclusive use, the Owners cite to the following facts. The maintenance and actual operation of the Townsend to Garrison 500 KV lines is controlled by the BPA. The BPA has reserved 185 MW of East to West transmission capacity unto itself and the Owners do not have access to the West to East transmission capacity over the Montana Intertie. Further, the testimony of experts at trial and in depositions established that it is impossible to identify the exact path that electrical power will follow when introduced into an integrated system such as exists between Colstrip and Garrison. In other words, one cannot identify whether the Owners' Colstrip power injected into the system at Colstrip flows over the 500 KV transmission lines or over other existing 230 KV transmission lines which interact with the 500 KV lines at the Broadview and Garrison substations.

We find, however, that the Owners do possess a sufficient beneficial use interest in the 500 KV lines, from Townsend to Garrison, which justifies the imposition of beneficial use taxes.

The United States Supreme Court has defined "beneficial use," in a case arising out of Missoula County, Montana, as follows:

> The expression "beneficial use" or "beneficial ownership or interest" in property is quite frequent in the law, and means, in this connection, such a right to its enjoyment as exists where the legal title is in one person and the right to such beneficial use or interest is in another, and where such right is

> recognized by law, and can be enforced by the courts, at the suit of such owner or of someone in his behalf.

Montana Catholic Missions v. Missoula County (1906), 200 U.S. 118, 127, 26 S.Ct. 197, 200, 50 L.Ed. 398, 402. See also *Harrison v. City of Missoula* (1965), 146 Mont. 420, 407 P.2d 703. Further the U.S. Court of Appeals for the Ninth Circuit has recognized a state may tax those contract rights granting such a beneficial use interest. *International Paper Co. v. County of Siskiyou* (9th Cir.1974), 515 F.2d 285. In the *International Paper Co.* case the counties attempted to tax the companies' interest in standing timber located in national forests. Under the sale contracts, title to the timber remained with the Forest Service until it had been cut, scaled and paid for. The Ninth Circuit held that the timber property, from which the company derived profit, was not exempt from taxation merely because the United States retained legal title to it as security. *Id.* at 289, citing *S.R.A., Inc. v. State of Minnesota* (1946), 327 U.S. 558, 570, 66 S.Ct. 749, 756, 90 L.Ed. 851, 860.

In the present case, the Colstrip Owners have an enforceable contract interest which gives them the right to the beneficial use of firm (a guaranteed level of the available transmission capacity) megawatts of power transmitted over the Montana Intertie line. The Montana Intertie Agreement gave the Owners the right to inject electrical power into and remove electrical power from the lines up to specific maximum megawatts of power. This right is subject only to the BPA's ability to transmit these amounts onward from the Garrison substation. We note the project scheduled power, (the amount of electric power each company schedules on an hour over the Montana Intertie up to the maximum allowed for each Company's East-West transmission demand) remained under the ownership of the Owners.

The Owners have exercised this right and used these lines to transmit power for their own commercial profit-making activities. Further, absent the transmission of any BPA or non-firm energy, the Owners are responsible for the total annual cost of the lines. The total annual cost of the transmission lines includes the cost of the government's investment in the Montana Intertie line and the Garrison substation, the annual cost of operating and maintaining the transmission line system, the BPA's administrative costs attributable to the lines and the cost to BPA of any impact-aid payments. The payment formula provides that the Owners receive a credit for BPA and non-firm transmission over the lines. The Owners are liable for these payments whether they use the lines or not. Under such an arrangement, we find the Owners clearly have a beneficial use interest in the Montana Intertie 500 KV lines.

The Owners contend, however, that even if a beneficial use existed, the interest was not exclusive, and thus it could not be taxed. The Owners assert they have no reservation of the remaining 185 MW of East to West transmission capacity nor to any of the West to East transmission capacity of the lines. Therefore, the imposition of beneficial use taxes resulted in the Owners being taxed on the full value of the property when they only had use of part of the lines. *United States v. County of Allegheny* (1944), 322 U.S. 174, 64 S.Ct. 908, 88 L.Ed. 1209.

This argument is without merit as the Montana Intertie Agreement provided that the BPA could not exercise its East to West reservation until the Garrison West 500 KV lines were operational. Thus, the BPA had no right to exercise its reservation in 1984, the year in which the taxes in this case were imposed. Secondly, testimony at trial established that the BPA would only allow reservation of a firm transmission demand on the West to East capacity of the lines if a requesting party showed a demonstrated

need for use of the lines. Until such a demonstrated need was shown, the only firm transmission users of the lines were the Owners, for whom the lines were constructed, and the BPA.

Testimony at trial established that the Montana Intertie line consisted of two bi-directional 500 KV electrical transmission lines. These bi-directional lines are capable of transmitting electrical power in either direction, however, they are not capable of transmitting power in both directions simultaneously. These lines are stability limited at approximately 2,000 MW, although a BPA employee testified that actual loading of the system at capacity would be lower. In negotiating the Montana Intertie, the Owners and BPA provided for maximum firm transmission demands, East to West, of 1,915 MW. Further, the Owners' intention has been to operate the Colstrip generating units as base loaded units. Base loaded generating units are intended to run at full capacity supplying constant power levels to the system.

We find the Montana Intertie 500 KV lines were built to transmit base load power from East to West. No other parties could use the lines because of the Owners' reservation of more than the amount which could be transmitted beyond the Garrison substation. Until other parties are able to exercise reservations in the lines' transmission capacity in either direction, at which time the Owners will be credited, the Montana Intertie's total capacity was reserved exclusively to the Owners. Consequently, the State had the statutory right to tax the Owners based upon the full value of the facilities.

COMMERCE CLAUSE

Having found the Owners possessed a taxable beneficial use interest in the exempt facility, we now address the Owners' claims that the imposition of these

taxes violated certain sections of the United States and Montana Constitutions. The Owners' first claim is that the imposition of beneficial use taxes on their use of the Montana Intertie line violated the Commerce Clause of the United States Constitution. The Owners contend that the Legislature intended to discriminate against interstate commerce by giving preferential treatment to Montana REA cooperatives and that the DOR has implemented the beneficial use statute in a discriminatory manner.

It is well established that a state may raise revenues by taking a private person or corporation's use of federal property within its jurisdiction, provided the state is taxing the possession or use of the property. *United States v. County of Fresno* (1977), 429 U.S. 452, 462, 97 S.Ct. 699, 704, 50 L.Ed.2d 683, 692. However, the fact that such a tax may have an impact on interstate commerce will subject the tax to commerce clause scrutiny. *Commonwealth Edison Co. v. Montana* (1981), 453 U.S. 609, 616, 101 S.Ct. 2946, 2952-2953, 69 L.Ed.2d 884, 893. A state may exact its fair share of the cost of state government from interstate commerce activities within the state, so long as the tax meets the test promulgated in *Complete Auto Transit, Inc. v. Brady* (1977), 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326. *Commonwealth Edison*, 453 U.S. at 617, 101 S.Ct. at 2953, 69 L.Ed.2d at 894. The *Complete Auto Transit* test requires, upon examination of the practical effect of the tax, that the tax be applied to an activity having a substantial nexus with the taxing state, be fairly apportioned, not discriminate against interstate commerce, and be fairly related to the services provided by the taxing state. *Complete Auto Transit*, 430 U.S. at 279, 97 S.Ct. at 1079, 51 L.Ed.2d at 331.

Applying this test to the facts in this case the Owners' activities, subject to the tax, had a substantial nexus to the State of Montana. They had exclusive contract rights to use approximately 90 miles of BPA 500 KV transmission lines across Montana. These lines were constructed for the

purpose of transmitting the Owners' electrical power generated at Colstrip, Montana to Garrison, Montana, and from there to the Owners' service loads. Further, as the Montana Intertie line is entirely within the state there is no potential for multiple state taxation of the use of the facilities. No other state would have jurisdiction to impose beneficial use taxes on these facilities. See, *Commonwealth Edison*, 453 U.S. at 617, 101 S.Ct. at 2953, 69 L.Ed.2d at 894.

Similar to the appellants in *Commonwealth Edison*, the Owners contend the tax assessed had a discriminatory effect on interstate commerce as the majority of the electrical power transmitted over these lines was destined for out-of-state consumers. These beneficial use taxes thus effectively exported the state's tax burden. However, as in *Commonwealth Edison*, the tax was computed at the same rate regardless of the destination of the power transmitted. MPC and Pacific used the power to service Montana customers and were assessed and taxed in the same manner as the other users of the lines. The fact the Legislature realized the brunt of the tax would fall upon out-of-state users of these lines would not invalidate the tax.

As stated by the United States Supreme Court:

> [M]otives alone will seldom, if ever, invalidate a tax that apart from its motives would be recognized as lawful. (Citations omitted.) Least of all will they be permitted to accomplish that result when equity and not preference is the end to be achieved.

Henneford v. Silas Mason Co. (1937), 300 U.S. 577, 586, 57 S.Ct. 524, 528, 81 L.Ed. 814, 820.

The Owners also contend this amendment effectively discriminates against bulk transferors of power by benefiting local users of the federal transmission system and those utilities and cooperatives which use lower

capacity transmission lines. In support of this contention the Owners point to the fact the amendment to the statute, § 15-24-1203, MCA, only applies to users of *500 KV and larger* electrical transmission lines. However, state legislatures have a wide range of choice when they classify or limit items subject to taxation. *Henneford*, 300 U.S. at 587, 57 S.Ct. at 529, 81 L.Ed. at 821, citing *Bell's Gap R. Co. v. Pennsylvania* (1890), 134 U.S. 232, 237, 10 S.Ct. 533, 535, 33 L.Ed. 892; *Ohio Oil Co. v. Conway* (1930), 281 U.S. 146, 159, 50 S.Ct. 310, 313, 74 L.Ed. 775, 781-782.

In the case at hand, the Legislature has identified a class of users of exempt property. This class consists solely of users of 500 KV and larger electrical transmission lines. These lines are used for the bulk transfer of electrical power. In this specific instance the Owners have contracted with the BPA to construct and operate 500 KV lines. As a result of the Owners' contract with the BPA, the Owners have the use of these lines which they otherwise would have been forced to construct themselves. Absent the implementation of the beneficial use tax, the Owners would have received the use of the Montana Intertie transmission facilities, essential to the sale of Colstrip generated power, free of the taxes they would be subject to if they had constructed the lines themselves. We do not find the effect of the legislation was to unfairly tax out-of-state users of the lines, rather the effect is to prevent all users of such exempt lines from unfairly reaping a tax windfall.

The Owners point to cases where the United States Supreme Court and Federal courts have found that state taxes discriminate against interstate commerce in favor of local businesses or consumers. However, these cases are distinguishable. In *Boston Stock Exchange v. State Tax Comm'n* (1977), 429 U.S. 318, 97 S.Ct. 599, 50 L.Ed.2d 514, the Supreme Court found a transfer tax on out-of-state sales of stocks violated the commerce clause. The Court

found that no state "may 'impose a tax which discriminates against interstate commerce ... by providing a direct commercial advantage to local business.'" *Boston Stock Exchange*, 429 U.S. at 329, 97 S.Ct. at 607, 50 L.Ed.2d at 524, citing *Northwestern States Portland Cement Co. v. Minnesota* (1959), 358 U.S. 450, 458, 79 S.Ct. 357, 362, 3 L.Ed.2d 421, 427. In the case at hand, however, the beneficial use tax has been imposed upon both local and interstate users of the 500 KV lines for the purpose of eliminating a tax windfall and competitive advantage which enure to the users of tax exempt federal property. This tax imposes no greater tax liability on interstate users of these lines than on instate users. See *Boston Stock Exchange*, 429 U.S. at 332, 97 S.Ct. at 608, 50 L.Ed.2d at 526.

Recently in the case of *United States v. City of Manassas, Va.* (4th Cir.1987), 830 F.2d 530, the Fourth Circuit Court of Appeals dealt with a Virginia statute which taxed users of federally owned property, but exempted users of similar state owned property from taxation. There the court found the controlling case for discriminatory state use taxes is *Phillips Chemical Co. v. Dumas School Dist.* (1960), 361 U.S. 376, 80 S.Ct. 474, 4 L.Ed.2d 384. In *Phillips*, the Court held such taxes must be examined based on "how other taxpayers similarly situated are treated." requiring "'an examination of the whole tax structure of the state.' Cf. *Tradesmens National Bank v. Oklahoma Tax Comm'n*, [(1940)] 309 U.S. 560, 568, [60 S.Ct. 688, 693, 84 L.Ed. 947]." *Phillips*, 361 U.S. at 383, 80 S.Ct. at 479, 4 L.Ed.2d at 389. The *Phillips* Court provided a two-part test for evaluating allegedly discriminatory state use taxes:

> 1) Are the users of federal property treated less favorably than similarly situated users of state property; and
>
> 2) If so, is that discrimination justified in light of the state and federal interest involved.

City of Manassas, 830 F.2d at 534. The Fourth Circuit Court of Appeals in *City of Manassas*, interpreted the justification in part two of the test as requiring a determination of whether the user of federal exempt property is similarly situated to a user of state exempt property. *City of Manassas*, 830 F.2d at 534.

At trial the only references to imposition of beneficial use taxes on state exempt property dealt with two short line railroads and the Great Falls Industrial Park. The Bureau Chief for the Intercounty Property Bureau testified that in 1986 the DOR determined these railroads qualified for imposition of beneficial use taxes under § 15-24-1203, MCA. She testified that those taxes were appealed to the State Tax Appeal Board, but that at the time of the trial, January 19, 1987, the railroads were still subject to beneficial use taxation. The Cascade County Assessor testified that the DOR had assessed beneficial use taxes on users of facilities at the Great Falls Industrial Park where the DOR found private parties' use met the requirements of § 15-24-1203, MCA. Neither party introduced any other beneficial use of similarly situated state exempt property, though several instances of beneficial use of other federal exempt properties were described. Based upon the above testimony we do not find the DOR discriminated against users of federal property in favor of similarly situated users of state exempt property.

Since the trial, the 1987 Legislature amended § 15-24-1203, MCA, to exempt the beneficial use of railroad right-of-way and track acquired by the state through abandonment, provided the state retains ownership and the right-of-way and track are used exclusively for rail transportation. This amendment was not considered by the District Court in its order of December 21, 1987, and we

find it is not properly before this Court on appeal. *Hanley v. Dept. of Revenue* (1983), 207 Mont. 302, 673 P.2d 1257.

The fourth prong of the *Complete Auto Transit* test questions whether the tax is fairly related to the services provided by the taxing state. In *Commonwealth Edison*, the Court found the "operating incidence" of the tax was on the mining of coal in Montana. As the tax was measured as a proportion of the value of the coal taken, it was in proper proportion to the appellant's activities in the state. The present case involves an "operating incidence" similar to *Commonwealth Edison* which falls upon the Owners' beneficial use of exempt electrical transmission lines found within the state. This tax is measured as a percentage of the value of the property in which the Owners possess their beneficial use interest.

> Because it is measured as a percentage of the value of the coal taken, the Montana tax is in "proper proportion" to appellants' activities within the State and, therefore, to their "consequent enjoyment of the opportunities and protections which the State has afforded" in connection with those activities. (Citations omitted.) When a tax is assessed in proportion to a taxpayer's activities or presence in a State, the taxpayer is shouldering its fair share of supporting the State's provision of "police and fire protection, the benefit of a trained work force, and 'the advantages of a civilized society.'" (Citations omitted.)

Commonwealth Edison, 453 U.S. at 626-627, 101 S.Ct. at 2958, 69 L.Ed.2d at 900. As the appropriate level of that tax percentage is a legislative matter, we find the tax fairly

reflects the taxpayer's activity in the state. *Id.* at 626-627, 101 S.Ct. at 2958-2959, 69 L.Ed.2d at 901.

SUPREMACY CLAUSE

The Owners' second claim is that the imposition of beneficial use taxes violated the supremacy clause of the United States Constitution. The Owners correctly assert there are two means by which a state tax may be invalidated under the supremacy clause. The state statute may be preempted by federal action or the tax may improperly place the legal incidence of the tax upon the property of the federal government.

The Owners contend that two federal statutes do in fact preempt Montana's imposition of beneficial use taxes upon private use of federally owned electrical transmission lines. The first is Section 2121(a) of the Tax Reform Act of 1976, 15 U.S.C. § 391 (Anti-Discrimination Act) (1982). This statute provides:

> No State, or political subdivision thereof, may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity. For purposes of this section a tax is discriminatory if it results, either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce.

This statute has been examined in *Arizona Public Service Co. v. Snead* (1979), 441 U.S. 141, 99 S.Ct. 1629, 60 L.Ed.2d 106. There the Court examined New Mexico's tax on electrical generation and complimentary tax credit for electrical sales in New Mexico. The effect of this credit was

to eliminate the 2 percent electrical generation tax for sales to New Mexico's electrical consumers, while taxing sales to out-of-state consumers. 15 U.S.C. § 391 (1982) was passed specifically to outlaw such taxes which place a greater tax burden upon electricity generated or transmitted in interstate commerce. The Court found that because the electrical energy tax indirectly discriminated against electricity sold outside the state, it violated the federal statute. *Arizona Public Service Co.*, 441 U.S. at 150, 99 S.Ct. at 1634, 60 L.Ed.2d at 113. The federal statute does not prevent a state from taxing the generation and transmission of electricity, but only requires that interstate and intrastate generation and transmission be treated equally. *Id.* at 150-151, 99 S.Ct. at 1634, 60 L.Ed.2d at 114.

Initially, we note that no credit is provided under Montana's beneficial use tax to anyone affected by its imposition and none is alleged. Further, the beneficial use tax on 500 KV electrical transmission lines applies equally to intrastate and interstate users of these lines. Testimony at trial established that Montana Power Company removed all of its power from the system at the Garrison substation for transmission to its load customers. MPC as an intrastate user is taxed at the same rate as the other users of the facilities. Also, this tax falls neither upon the generation nor the transmission of electrical power, but upon the use of tax exempt facilities. As such, this tax does not violate 15 U.S.C. § 391.

The Owners next contend 16 U.S.C. § 839e(m) preempts § 15-24-1203, MCA. This statute provides for the payment of impact-aid payments to offset the added cost to affected counties for the three construction phases of the Montana Intertie line. The three construction phases are pre-construction, which was complete before the Act was passed, construction, for which the three affected counties received over $150,000 in impact-aid payments, and post-construction. In the post-construction phase the counties

may bill the BPA for any services provided as a result of the presence of the lines. The Owners' contention that these impact-aid payments were in lieu of taxes fails in light of testimony at trial. At trial, BPA's project information officer for the Colstrip transmission project testified that these impact-aid payments were not intended to be in lieu of taxes which the counties were losing as a result of federal ownership of the 500 KV lines. This statement is reinforced by U.S. Representative Dingell's statement contained in the environmental impact statement. 48 Fed.Reg. 55765. ("This is not a payment-in-lieu of taxes provision.")

The Owners also advance an implied preemption argument based upon a line of cases holding that preemption may be inferred when a scheme of federal regulation leaves no room for state regulation, or when the regulation is so dominant as to "preclude enforcement of state laws on the same subject." *Hillsborough County v. Automated Medical Laboratories* (1985), 471 U.S. 707, 105 S.Ct. 2371, 85 L.Ed.2d 714. The argument fails, however, in light of our previous findings regarding statutory preemption. The impact-aid payments contained in 16 U.S.C. § 839e(m), do not preclude a state's right to levy taxes on a private party's beneficial use interest in exempt federal transmission facilities. Further, 15 U.S.C. § 391 only precludes the implementation of a state tax scheme which places a greater tax burden on generation or transmission of electricity placed in interstate commerce. As previously stated the Montana beneficial use tax is levied on the beneficial use of the facilities and is equally applied to interstate and intrastate users of the facilities.

The Owners' last supremacy clause argument is that the legal incidence of the beneficial use tax falls on the federal government. In order to find a state tax on use of such exempt properties unconstitutional under a legal incidence argument, the taxed entity must be "so

intimately connected with the exercise of a power or the performance of a duty' by the Government that taxation of it would be 'a direct interference with the function of government itself.'" *United States v. New Mexico* (1982), 455 U.S. 720, 736, 102 S.Ct. 1373, 1383, 71 L.Ed.2d 580, 593, citing *James v. Dravo Contracting Co.* (1937), 302 U.S. 134, 157, 58 S.Ct. 208, 219, 82 L.Ed. 155, 171. Where the legal incidence of the tax falls on a private party, and they are independent entities from the United States, the tax cannot be considered a tax on the government itself. *U.S. v. New Mexico*, 455 U.S. at 738, 102 S.Ct. at 1385, 71 L.Ed.2d at 594. In the *New Mexico* case, the government sought to show that beneficial use taxes, based upon management contracts which transferred payment of any state taxes imposed to the federal government, placed the legal incidence of the tax on the federal government. The United States Supreme Court found that the fact the federal property involved was being used for the government's benefit was irrelevant. *Id.* at 739, 102 S.Ct. at 1385, 71 L.Ed.2d at 595. The Court found the contractors remained "distinct entities pursuing 'private ends,' and their actions remained 'commercial activities carried on for profit.'" *Id.* at 739-740, 102 S.Ct. at 1385, 71 L.Ed.2d at 595, citing *United States v. Boyd* (1964), 378 U.S. 39, 44, 84 S.Ct. 1518, 1521-1522, 12 L.Ed.2d 713, 718. Such a tax does not fall upon the federal government, but rather upon the contractor's independent commercial enterprise.

In the instant case the tax is levied directly upon the Owners for their beneficial use of the federal government's facilities. There is no transfer of the tax liability to the government. In fact, the Montana Intertie Agreement provides any costs the government incurs by way of the Owners' use of these transmission lines are billable annually to the Owners. The "legal incidence" of the beneficial use tax in this case clearly falls upon the Owners and not upon the federal government.

The Owners argue that the imposition of these taxes on the Owners' use of the Montana Intertie line would adversely affect the government's ability to secure adequate lease fees from these types of lines. This argument must fail for two reasons. First, the United States Supreme Court has upheld use taxes even where the government by contract agrees to pay the state use or excise tax. See, *James v. Dravo Contracting Co.* (1937), 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 155. Second, in the contracts which grant the use in this case, the Owners are obligated not only to pay the cost of operating and maintaining the lines each year, (less credits for BPA transmissions and non-firm transmissions), but the cost of constructing these lines as well. Under such an arrangement it is implausible that imposing these taxes upon the use of the exempt lines would adversely impact the government's ability to secure adequate lease values.

FOURTEENTH AMENDMENT

The Owners contend the imposition of beneficial use taxes in this case violates the Due Process Clause and the Equal Protection Clause under the Fourteenth Amendment to the United States Constitution. The Owners contend that the Due Process Clause requires that the amount of the tax must bear some relation to the value of the property assessed against the taxpayer. *Norfolk & Western Railway Co. v. Missouri State Tax Commission* (1968), 390 U.S. 317, 88 S.Ct. 995, 19 L.Ed.2d 1201. The Owners allege that the defendant counties have conferred no benefit upon the Owners because of their use of the Townsend to Garrison facilities, that the defendant counties have already been fully compensated through the impact-aid portions of the Montana Intertie Agreement and that the taxes imposed are based on the full value of the facilities. Further, the Montana Intertie Agreement gives appellants rights which are far less than full ownership.

State tax statutes will not normally be set aside based upon Due Process Clause violations, except in rare and unusual circumstances. *A. Magnano Co. v. Hamilton* (1934), 292 U.S. 40, 54 S.Ct. 599, 78 L.Ed. 1109. Further, to attack the tax statute, the appellants must show a failure to satisfy two tests. First, the object of the tax must lack a nexus with the state imposing the tax, and second, the tax must fail to fairly reflect the taxpayer's activity in the taxing state.

Sufficient nexus with the state has already been established under the Commerce Clause section previously discussed. Additionally, we previously found under the fourth prong of the *Complete Auto Transit* test, that the tax is fairly related to the services provided by the state. Thus, there is no violation of the Due Process Clause.

The Owners contend the Equal Protection Clause invalidates the beneficial use tax because the state has not equally administered the beneficial use taxes. *Raymond v. Chicago Union Traction Co.* (1907), 207 U.S. 20, 28 S.Ct. 7, 52 L.Ed. 78; and *Larson v. State* (1975), 166 Mont. 449, 534 P.2d 854. The Owners claim that the Department has never attempted to apply the beneficial use tax in analogous situations, specifically referring to the Montana Rural Electrification Administration Cooperatives (REAs).

These REAs, as preference customers, are entitled to purchase federal power at a preferred or "Priority Firm Rate." This rate is lower than the rate investor-owned utilities are entitled to when they purchase federal power. These REAs also have a right to first call on federal power, before investor-owned utilities. The Owners claim the beneficial use taxes would be applicable to BPA's preference customers based on their use of the BPA transmission system, including the BPA's 500 KV lines. The Owners also contend this is the first attempt to apply the beneficial use tax upon any entity that did not have "exclusive use"

of the subject facilities. The Owners equate exclusive use to a requirement that they have possession of the facilities and transmission lines.

The standard which must be achieved to invalidate the tax on equal protection grounds is one of invidious discrimination, as opposed to the existence of a rational relationship. *Lehnhausen v. Lake Shore Auto Parts Co.* (1973), 410 U.S. 356, 93 S.Ct. 1001, 35 L.Ed.2d 351. The existence of a rational relationship is met here by the intent to close the loophole which would have allowed these companies to avoid paying any taxes. In regard to the Owners' claims regarding the REAs, we note they do not use the Montana Intertie line, nor possess firm transmission demands in 500 KV lines which may be taxed in 1984, under § 15-24-1203, MCA.

We agree with the DOR that the Legislature was not required to tax all beneficial users before it could reach the beneficial users of 500 KV lines. ("[T]axation of certain objects need not be universal in nature.") Citing to *Louisiana v. Pilsbury* (1881), 105 U.S. 278, 26 L.Ed. 109. The Legislature in this case has identified beneficial users of 500 KV lines as a distinct tax classification.

THE MONTANA CONSTITUTION

Additionally, the Owners claim the imposition of beneficial use taxes in this case violates three provisions of the 1972 Montana Constitution. The Owners contend that while Art. VIII, sec. 5(1)(a) allows "private interests" in exempt properties to be taxed separately, such a tax necessarily requires the user to have possession. The Owners base this requirement of possession upon statement made at the Constitutional Convention that in closing an existing loophole the delegates provided for taxation of private interests in government-owned property, "things like right-of-ways and things like that ..." Further, the

Owners contend the Montana Supreme Court, in identifying an "interest" in real property as an estate, has implied one must have the right to possess and control property before beneficial use taxes may be imposed. *Brown v. Hart* (1984), 213 Mont. 517, 692 P.2d 14.

We disagree. What is involved here is a private contractual right to use a portion of the transmission capacity of the exempt Townsend-Garrison line. This private interest in exempt federal lands fits within the plain language employed by the 1972 Constitutional Convention delegates in closing this loophole contained in the prior constitution.

> (1) The legislature may exempt from taxation:
>
> (a) Property of the United States, the state, counties, cities, towns, school districts, municipal corporations, and public libraries, but any private interest in such property may be taxed separately.
>
> . . . . .

Art. VIII, sec. 5(1)(a), 1972 Montana Constitution.

The Owners next claim that the imposition of beneficial use taxes on their use of the Montana Intertie line violates Art. XIII, sec. 1(3), prohibiting retrospective laws. Specifically the Owners contend that since the Montana Intertie Agreement was entered in 1981 and § 15-24-1203, MCA, was not amended to specifically include 500 KV transmission lines until 1983, the effect of imposing these taxes is precisely the type of retrospective action the 1972 Constitutional Convention was prohibiting.

We find several problems with the Owners' argument. First, the argument ignores the ongoing nature of their use of these lines. Second, this contention is weakened by

Art. VIII, sec. 5(1)(a) which specifically allows for taxation of the interests conveyed to the Owners under the Montana Intertie Agreement. We agree with the District Court that the position the Owners advance would have the effect of prohibiting all new forms of taxation. "The imposition of a new tax, or an increase in the rate of an old one, is simply one of the usual hazards of the business enterprise." *Westfield-Palos v. City of Rancho Palos Verdes* (1977), 73 Cal.App.3d 486, 141 Cal.Rptr. 36, 42, citing *John McShain, Inc. v. District of Columbia* (D.C.Cir.1953), 205 F.2d 882, 883.

> Only where the measuring formula for the tax draws upon such disparate or long past antecedents so as to have little relation to the volume of current business might a business license tax fall on retroactivity grounds. (Citations omitted.)

Westfield-Palos, 141 Cal.Rptr. at 42. We find that the beneficial use tax involved here, like the business license tax in *Westfield-Palos* applies to the ongoing, current business activity of the Owners. As such, the tax does not violate Art. XIII, sec. 1(3), of the 1972 Montana Constitution.

The Owners' final issue relies on Art. II, sec. 31, of the 1972 Montana Constitution in contending the imposition of these beneficial use taxes constitutes an impairment of their contract with the BPA. This argument is without merit as it has long been established that "[a] contract between individuals cannot have the effect of depriving the state or any municipal subdivision of any power of taxation otherwise belonging to it." *Forbes v. Mid-Northern Oil Co.* (1935), 100 Mont. 10, 22, 45 P.2d 673, 679, citing *Newman v. Commercial Waterway District* (Wash.1923), 125 Wash. 577, 217 P. 9. As long as the state does not violate a fundamental right of the individual, the state is free to vary the existing mode of taxation. *Forbes*, 45 P.2d at 679. As Art. II, sec. 31 of the 1972 Montana Constitution is

essentially identical to Art. 3, sec. 11 of the 1889 Montana Constitution, under which the *Forbes* case was decided, we find the Owners have presented no reason to find there has been any impairment of their contract.

CONCLUSION

The Owners enjoyed a beneficial use interest in the Montana Intertie Agreement 500 KV lines, which use we hold was properly taxable under § 15-24-1203, MCA. That use was evidenced by the Owners' contractual reservation of firm transmission demands in the lines and the fact the lines were constructed for the purpose of transmitting the Owners' electrical power generated at the Colstrip generating facilities. The State's levy of these beneficial use taxes did not violate the United States Commerce Clause, the United States Supremacy Clause, the Fourteenth Amendment to the United States Constitution, nor the cited sections of the Montana Constitution. Therefore we affirm the order of the District Court.

TURNAGE, C.J., and HARRISON, McDONOUGH, SHEEHY, HUNT and WEBER, JJ., concur.

PORTLAND GENERAL ELECTRIC COMPANY,
Plaintiff and Appellant,

v.

MONTANA DEPARTMENT OF REVENUE, et al.,
Defendants and Respondents.

No. 88-160.

Supreme Court of Montana.
Submitted Feb. 28, 1989.
Decided May 10, 1989.

Affirmed.

Donald R. Murray, Murphy, Robinson, Heckathorn & Phillips, Kalispell, Thomas H. Nelson, argued, Stoel Rives, Boley, Jones & Grey, Portland, Or., for plaintiff and appellant.

Larry G. Schuster, argued, Dept. of Revenue, Helena, for defendants and respondents.

HARRISON, Justice.

Appellant, Portland General Electric (hereinafter PGE), appeals an order entered by the Honorable Henry Loble, First Judicial District Court, Lewis and Clark County, Montana, denying injunctive and declaratory relief. We affirm.

This case concerns the imposition of beneficial use taxes, pursuant to § 15-24-1203, MCA (1983), for appellant's use of the Hot Springs to Idaho Border portion of the BPA

500 kilovolts (KV) transmission line system within the State of Montana.

> [T]here is imposed and shall be collected a tax upon the possession or other beneficial use enjoyed by any private individual, association, or corporation of any property, real or personal, which for any reason is exempt from taxation ... The tax shall be imposed upon the possession or other beneficial use of an electric transmission line and associated facilities, except that lines and facilities of a design capacity of less than 500 kilovolts shall not be subject to the tax.

Section 15-24-1203, MCA.

Much of the factual background surrounding this case has previously been discussed in our decision, *Pacific Power & Light Co. v. Department of Revenue*, 773 P.2d 1176 (1989). Therefore, we will limit the extensive background discussion and instead focus on the additional facts relevant to this case.

PGE is an investor-owned utility which provides retail electric utility service to customers located in the State of Oregon. PGE owns an undivided 20% interest in Colstrip Units III and IV, which began operation in October of 1983 and 1985, respectively. The other four Colstrip owners are Pacific Power & Light Company, Washington Water Power Company, Puget Sound Power & Light Company, and Montana Power Company. Collectively, these companies are referred to as the "Colstrip Owners."

With the development of Colstrip Units III and IV, additional transmission capacity was needed from the Colstrip facilities to the west. To accommodate the increased generation, Colstrip Owners initially converted one 230 KV line extending from the generating facilities to

a substation near Broadview, Montana, to 500 KV and constructed a second 500 KV line. From the Broadview substation, the Colstrip Owners' 500 KV lines extend westward to a point near Townsend, Montana. At Townsend, the Colstrip Owners' 500 KV lines interconnect with the Bonneville Power Administration's (BPA) 500 KV lines. The portion extending from Townsend to the BPA's Garrison substation is referred to as the Montana Intertie, and is extensively discussed in our previous opinion, *Pacific Power & Light Co.* In 1986, anticipating the completion of Colstrip Unit IV, the BPA, at the request of the Colstrip Owners, completed the Garrison-West lines connecting the Garrison substation to the Taft, Montana, substation and points to the west. Prior to the completion of the Garrison-Taft 500 KV transmission lines, the Hot Springs-Dworshak lines were the only existing 500 KV lines providing access to the west.

From the BPA substation at Garrison, Montana, the transmission of Colstrip power is governed by separate contracts, commonly referred to as the Garrison-West Agreement. These contracts continue for a period of 22 years, with a right to renew at comparable terms. Under each Owners' separate contract with the BPA, power would be introduced at the Garrison substation and transmitted across the entire BPA "main grid" which included both 230 and 500 KV lines. Notably, appellant entered into no other agreement for the transmission of its Colstrip power to points west.

Under the terms of PGE's agreement with the BPA, PGE requested BPA provide adequate transmission facilities west of Garrison, Montana, to transmit power on a firm basis over the Federal Transmission System to PGE's system load at the Pearl substation in Oregon. PGE made available and BPA was required to accept scheduled power not to exceed the reserved transmission demand set forth on Exhibit D of the Garrison-West Agreement. Exhibit D

provided that from the date of commercial operation of Colstrip Unit III until the date when the 500 KV transmission lines connecting Garrison to the Federal 500 KV transmission system first became available for scheduling power (the Garrison-Taft lines), the transmission demand for PGE was zero. However, a footnote in Exhibit D provided for the five Colstrip owners to allocate BPA's available 330 megawatts transmission capacity.

At this point, a brief explanation describing the 330 megawatt limitation is in order. From the Garrison substation to points west, the BPA lacked transmission line capacity to accommodate full transmission of Colstrip power to the Owners' individual system loads. This lack of transmission capacity is due to a gap in the 500 KV lines between the Garrison substation and the Hot Springs substation, referred to in this litigation as the "bottleneck." Between the two substations, the BPA had only 230 KV lines, which proved insufficient to accommodate the total scheduled Colstrip power. Recognizing its inability to fulfill obligations under the Garrison-West Agreement, the BPA imposed a 330 megawatt limitation upon the amount of power which could be scheduled west of the Garrison substation, until the Garrison-Taft 500 KV lines were completed.

On December 20, 1983, a Montana Power Company representative contacted BPA officials indicating Colstrip Owners had reached an agreement on the allocation of BPA's 330 megawatts. Respectively, PGE was allocated 65 megawatts transmission demand. The reserved amount is reflected in a revised Exhibit D to the PGE's Garrison-West Agreement. In turn, the BPA responded on February 4, 1984, stating:

> This is to confirm that each of your companies [Colstrip Owners] has sent BPA a letter agreeing with the allocation, contained in The Montana

Power Company's letter dated December 20, 1983, of the 330 MW of transmission capacity available to the Colstrip owners on BPA's Garrison-Hot Springs transmission line during the period starting with commercial operation of Colstrip Unit No. 3 and ending at 2400 hours on the date when the Garrison-Taft 500 kV transmission line is available for scheduling power, pursuant to existing contracts for wheeling Colstrip power.

. . . . . .

Company	Bonneville Contract No.	Transmission Demand
...		
Portland	DE-MS79-81BP00167	65 MW

Once scheduling of Colstrip power over the Hot Springs to border line began, PGE was required to pay BPA a monthly charge calculated pursuant to the terms of the Garrison-West Agreement. The transfer of energy was "deemed" to have occurred whether or not there was actual physical transmission. Therefore, the monthly charge was due BPA regardless of PGE's actual transmission flow across the lines.

Beginning in the tax year 1985, the Department of Revenue (DOR) imposed taxes upon appellant for its "beneficial use" of the BPA 500 KV transmission lines from Hot Springs to the Idaho border. The assessment was based upon a report submitted by PGE, pursuant to Rule 42.22.107, ARM, stating that it "had no possession or use of a government-owned transmission line in 1984; it had only a contract right to certain services provided by the Bonneville Power Administration ("Bonneville") on the 500-kilovolt transmission line" between Townsend-to-Garrison and Hot Springs-to-Idaho border. The other Colstrip Owners did not submit similar reports to the DOR.

The DOR prepared a beneficial use assessment for PGE using the unitary approach. Initially, the DOR assessed PGE's use of the Hot Springs to border lines based upon the capitalized payments made by PGE to the BPA in 1984. However, shortly before trial, depositions revealed such payments represented charges for the use of both 230 and 500 KV lines. Thereafter, the DOR prepared a revised assessment excluding the effect of tax-exempt 230 KV lines.

Appellant presents eight issues on appeal, each of which would invalidate the imposition of the challenged taxes. Three of the issues arise under the United States Constitution, three under the Montana Constitution and two are statutory challenges. However, our decision in *Pacific Power & Light, Co.* forecloses appellant's arguments of the first seven issues. Therefore, our opinion will deal exclusively with appellant's eighth issue contending that a portion of the beneficial use tax assessment was attributable to exempt property.

This case comes to us against a backdrop of extensive technological changes in the electrical transmission industry. *Goldberg v. Sweet*, 109 S.Ct. 582 (1989). As noted in the factual discussion, BPA's entire integrated network is used to schedule power. The power transmitted across electrical lines cannot be accurately identified, and indeed, the path taken is often indirect and bears no relation to contract requisites. Instead, we have only the input point and the eventual withdrawal of energy at a specified location. Between the two, various factors indicate a likely, though not actual, transmission path.

Initially, we discuss our determination that PGE possessed a "beneficial use" within the meaning of the statute. Contrary to appellant's argument, no physical possession, exclusive use or control of the facilities is necessary. Rather, "beneficial use" has long been defined as a right recognized by law and enforceable by the courts.

> The expression "beneficial use" or "beneficial ownership or interest" in property is quite frequent in the law, and means, in this connection, such a right to its enjoyment as exists where the legal title is in one person and the right to such beneficial use or interest is another, and where such right is recognized by law, and can be enforced by the courts, at the suit of such owner or of some one in his behalf.

Montana Catholic Missions v. Missoula County (1906), 200 U.S. 118, 127-128, 26 S.Ct. 197, 200, 50 L.Ed. 398, 402; See also *Harrison v. City of Missoula* (1965), 146 Mont. 420, 407 P.2d 703; *Pacific Power & Light, Co.* To advance its commercial activities, and thereby increase profits, PGE contracted for firm transmission capacity over the BPA lines. This is an enforceable contract interest in firm megawatts of power. While PGE may not possess the lines, nonetheless, the power flowing through the lines remain under PGE's ownership. Finally, PGE pays for the use of the lines regardless of the actual transmission flow. We find the reservation of firm transmission demand grants PGE an exclusive right taxable under § 15-24-1203, MCA.

The physical wheeling of energy is not specific as to which line it passes through, but rather the energy can travel through various lines as long as the delivery point is where the contract specifies. However, the facts reflect the essential nature of the Hot Springs-Dworshak lines. PGE contracts to transmit bulk transfers of power, necessitating the use of the higher voltage, lower impedance, 500 KV lines. Without the Hot Springs lines, the transfer capability of Colstrip power to the west would be substantially affected. Indeed, BPA officials indicated that it could not fulfill contract obligations absent the Hot Springs lines. Clearly, the Hot Springs lines are a vital portion of the BPA's main grid.

Appellant contends the DOR's assessment erroneously assumed that only 500 KV facilities would be used in providing services, ignoring the fact that a substantial portion of the transmission facilities consist of tax exempt 230 KV lines. PGE argues that in reality, the power is scheduled over the entire BPA transmission system and generally no line or path is associated with a particular power schedule.

The 500 KV lines from Hot Springs to the Idaho border are in the direct transmission path of PGE's bulk energy transfers to its Pearl substation. It is significant to note that no 230 KV lines exist parallel to the 500 KV lines. This fact strengthens the assumption that the 500 KV lines are essential to PGE's energy transfers in this case, and are properly taxed.

It is not disputed that the DOR did not rely on actual transmission flows. Rather, the assessment was based exclusively upon PGE's Garrison-West Agreement with the BPA providing for firm transmission rights. To eliminate any influence of 230 KV lines in the assessment, the DOR requested BPA to provide the detailed information regarding the actual cost of the installed Hot Springs lines located within the State of Montana, and information regarding the total capacity of the lines and date of installation. From the total cost, the DOR applied a straight line depreciation to the amount, awarding 13 years depreciation based upon a 35 year life. To the depreciated cost, the DOR multiplied a fraction isolating PGE's interest in the lines, (denominator represents the lines' capacity; and the numerator consists of PGE's firm transmission demand). This value was then integrated into PGE's centralized assessment, and thereby subject to a 40% weighting figure which the DOR ascribes to the cost indicator. *Puget Sound Power and Light Co. v. Department of Revenue* (Mont.1988), 761 P.2d 336, 45 St.Rep. 1078.

A tax for the beneficial use of property, as distinguished from a tax on property itself, is commonplace. Likewise, the United States Supreme Court decisions support a tax measured by the value of the tax-exempt property:

> In measuring such a use tax it seems neither irregular nor extravagant to resort to the value of the property used; indeed no more so than measuring a sales tax by the value of the property sold ... In our judgment it was not an impermissible subterfuge but a permissible exercise of its taxing power for [the State] to compute its tax by the value of the property used.

United States v. City of Detroit (1958), 355 U.S. 466, 470, 78 S.Ct. 474, 476, 2 L.Ed.2d 424, 427; *United States v. Boyd* (1964), 378 U.S. 39, 84 S.Ct. 1518, 12 L.Ed.2d 713.

Reviewing the facts, we conclude that the tax was imposed on the privilege of using the property. The assessment reflects PGE's contractual reserve arrangement with the BPA, thereby ignoring actual flows and they lines' west to east transmission capacity.

Affirmed.

TURNAGE, C.J., and GULBRANDSON, McDONOUGH, HUNT, SHEEHY and WEBER, JJ., concur.

BEFORE THE STATE TAX APPEAL BOARD
OF THE STATE OF MONTANA

PACIFIC POWER & LIGHT COMPANY, et al.,	)	DOCKET NOS: SPT-1988-4;
	)	SPT-1988-5;
Appellants,	)	SPT-1988-6;
	)	SPT-1988-8;
THE DEPARTMENT OF REVENUE OF THE STATE OF MONTANA,	)	SPT-1988-9;
	)	SPT-1988-11 and
	)	SPT-1989-4
	)	(CONSOLIDATED)
Respondent.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER and OPPORTUNITY FOR JUDICIAL REVIEW

The above-entitled proceeding having been fully heard and submitted to the State Tax Appeal Board of the State of Montana; the parties having appeared by their respective attorneys; the record of the proceeding, consisting of a transcript of the hearing and all evidence received there, and all pleadings, depositions, and other papers filed by the several parties, having been prepared and the whole thereof duly considered, the following findings are hereby made from the entire record:

STATEMENT OF THE ISSUE

The one remaining issue before the State Tax Appeal Board in these appeals is the propriety of the Department of Revenue's beneficial use tax assessment for the Garrison to Taft 500 kv transmission line system as it has been assessed to the respective contractual users (Pacific Power and Light Company, Portland General Electric

Company, Puget Sound Power and Light Company, and the Washington Water Power Company) for 1986 (tax year 1985). There are no issues of appraisal procedure or methodology or taxable value.

FINDINGS OF FACT

1. The parties were accorded notice of the hearing, in the manner provided for by law.

2. The Board has jurisdiction over the issues in *Pacific Power & Light Co., et al. v. Department of Revenue,* No. SPT-1988-5, pursuant to 15-8-601, MCA.

3. The Department prepared 1986 centralized tax assessments for the operating property of each of the Colstrip owners. The 1986 assessments included beneficial use tax assessments, for the use of the Garrison to Taft 500 kv transmission line system, pursuant to 15-24-1203, MCA.

4. The Department mailed the 1986 beneficial use tax assessments to each of the Colstrip owners on June 19, 1986.

5. On May 27, 1988, the Department advised each of the Colstrip owners that its 1986 Garrison to Taft beneficial use tax assessment was being revised pursuant to 15-8-601, MCA.

6. On June 24, 1988, Mary Whittinghill conducted an assessment review conference with a representative for each of the five Colstrip owners concerning its revised beneficial use tax assessment for the 1986 tax year.

7. On July 1, 1988, Mary Whittinghill advised a representative for each of the Colstrip owners that its bene-

ficial use tax contentions, which had been raised during the assessment review conference, had been denied.

8. On July 14, 1988, the Colstrip owners filed the appeal to the State Tax Appeal Board in SPT-1988-5 concerning the revised 1986 beneficial use tax assessments.

9. The Department's 1986 revised beneficial use tax assessments for the Garrison to Taft portion of the 500 kv transmission line system (to establish the allocation of owners' share of contractual rights) were predicated upon the following elements:

December 1985 plant $184,742,794
BPA Accounting Dept.

	TRANSMISSION DEMAND
Pacific	140,000 kw
PGE	270,000 kw
Puget	466,000 kw
Water Power	393,000 kw
TOTAL	1,915,000 kw

			Market Value
Pacific	7.31%	$13,506,001	$ 6,753,000
PGE	14.10%	$26,047,287	$13,023,643
Puget	24.33%	$44,955,688	$22,477,844
Water Power	20.52%	$37,913,273	$18,956,637
	66.27%	$122,422,248	$61,211,124

10. On April 17, 1981, Pacific entered into a Garrison West Agreement with Bonneville Power Administration. The agreement is Contract No. DE-MS79-81B90168.

On April 17, 1981, PGE entered into a Garrison West Agreement with Bonneville Power Administration. The agreement is Contract No. DE-MS79-81BP90167.

On April 17, 1981, Puget Power entered into a Garrison West Agreement with Bonneville Power Administration. The agreement is Contract No. DE-JS79-81BP90169.

On April 17, 1981, Water Power entered into a Garrison West Agreement with Bonneville Power Administration. The agreement is Contract No. DE-MS79-81BP90165.

On April 17, 1981, Montana Power Company entered into a Garrison West Agreement with Bonneville Power Administration. The agreement is Contract No. DE-MS79-81BP90166.

11. The Colstrip owners' annual reports to the Federal Energy Regulatory Commission for the year ending December 31, 1985, were received into evidence. Those reports reflect that four of the Colstrip owners reported their investment in Colstrip Unit 4 as construction work in progress.

Colstrip owner	Colstrip Unit 4 CWIP
Puget	$247,429,707
PGE	$186,225,337
Water Power	$102,964,950
Pacific	$ 81,575,303

12. PGE submitted an application in order to have its investment in Colstrip Unit 4 classified as new industrial property, pursuant to 15-6-135, MCA. The application sets forth a representation that Colstrip Unit 4 was operational on December 15, 1985.

13. PGE submitted its annual report to the Department on April 2, 1986. The report was submitted pursuant to ARM 42.22.105. The report reflects that PGE did not characterize its investment in Colstrip Unit 4 as construction work in progress. It characterized its investment in Colstrip Unit 4 as plant in service.

14. Montana Power Company sold its 30 percent interest in Colstrip Unit 4 to a group of New York investors on December 30, 1985. Those investors filed an application in order to have their interests in Colstrip Unit 4 classified as new industrial property pursuant to 15-6-135, MCA. The application was submitted on April 29, 1986. The application sets forth a representation that after December 1, 1985, but before December 30, 1985, Colstrip Unit 4 became operational.

15. The Colstrip owners submitted an application in order to have a portion of their property at Colstrip Unit 4 classified as pollution control equipment pursuant to 15-6-135, MCA The application was submitted to the Department of Health and Environmental Services, and it was dated April 9, 1986. The application sets forth a representation that Colstrip Unit 4 was operational before December 30, 1985.

16. Mr. Brush, an engineer for Montana Power Company, testified that there was a major effort to have Colstrip Unit 4 synchronized to the system before the end of December 1985. Mr. Brush defined "synchronized to the system" as connecting a generator to a transmission line system in such a fashion that they operate in a parallel fashion.

17. Mr. Pederson, the Controller of Montana Power Company, testified that the sale/lease-back transaction between MPC and the purchasers of Colstrip Unit 4 was structured so that the purchasers of Colstrip Unit 4 could

obtain the maximum benefits under the federal income tax laws. In order to satisfy the requirements of the Internal Revenue Code, the parties had to demonstrate that Colstrip Unit 4 produced a "substantial amount of power" before the end of December 1985. Mr. Pederson testified that the parties were able to satisfy the Internal Revenue Service that Colstrip Unit 4 produced a "substantial amount of power," and that it was treated as an operating property for purposes of the federal income tax laws on December 31, 1985.

18. Mr. John Nicolay, of the Burlington Northern Railroad Company, was deposed. He testified that he had served as the Bureau Chief of the Inter-County Property Bureau of the Department until 1986.

Mr. Nicolay testified that he was approached by Keith Kovash concerning the tax treatment of Colstrip Unit 4 for the 1986 tax year. He testified that Mr. Kovash had represented that Colstrip Unit 4 would become commercially operational shortly after the first of the year in 1986. Mr. Nicolay also testified that the Colstrip owners had advised him that Colstrip Unit 4 was operational during year-end 1985, and that it was producing test power. Mr. Nicolay also testified that the Colstrip owners had requested that he treat Colstrip Unit 4 as "plant in service" for the 1986 tax year, just as he had treated Colstrip Unit 3 as plant in service for the 1984 tax year. Mr. Nicolay also testified that the Colstrip owners had represented to him that Colstrip Unit 4 would be "closed to plant" or "closed to books" shortly after the first of the year in 1986.

19. The Board finds that Mr. Nicolay had knowledge of the applications identified in Findings of Fact 12, 14, and 15. According to Mr. Kovash, Mr. Nicolay and the Department were led to believe by the Colstrip owners that Colstrip Unit 4 was operational during year-end 1985. The

Board also finds that Mr. Nicolay and the Department were led to believe by the Colstrip owners that Colstrip Unit 4 would become *commercially* operational shortly after the first of the year in 1986.

20. The Board finds that the Department treated the four Colstrip owners' investment in Colstrip Unit 4 as plant in service, as a result of the factual representations set forth in Findings of Fact 18 and 19.

21. The mathematical effect of treating the four Colstrip owners' investments in Colstrip Unit 4 as plant in service rather than as CWIP is reflected in Exhibit 110. That exhibit reflects that those four Colstrip owners' 1986 ad valorem tax assessments were reduced by $77,277,083.

22. Mary Whittinghill described the original 1986 beneficial use tax assessment methodology. She testified that the Department relied upon the audited cost figure of the 500 kv transmission line system which was submitted by Bonneville Power Administration. She testified that the Department established a mathematical ratio in order to allocate the cost to each of the Colstrip owners, as a measure of their beneficial use interest in the 500 kv system. The ratio was computed by dividing each Colstrip owner's respective transmission demand under Exhibit D to its Garrison West Agreement by 1,915 megawatts. (the capacity of the transmission line system from Garrison to Taft). The Department multiplied the cost times the resulting ratio. The transmission demands which were extracted from the Garrison West Agreements, were the fully stepped-up transmission demands after Colstrip Unit 4 became commercially operational.

23. The Department added the allocated cost, as described in Finding of Fact 22, to the unit method of appraisal for each Colstrip owner, after the Montana Value had been determined.

24. None of the Colstrip owners appealed its original 1986 beneficial use tax assessment to this Board.

25. The Colstrip owners' Garrison West Agreements with Bonneville reflected that they enjoyed the following transmission demands, once Colstrip Unit 4 became commercially operational.

> Effective at 2400 hours on the later of (1) the date of commercial operation of Colstrip Unit 4 or (2) the date when a 500 kV transmission line, connecting Garrison to the Federal 500 kV Main transmission System at or west of Hot Springs, first becomes available for scheduling power, for the remainder of the term of this contract:

Colstrip owner	Contract No.	Transmission Demand
Puget	DE-MS79-81BP90169	466,000 KW
PGE	DE-MS79-81BP90167	270,000 KW
Water Power	DE-MS79-81BP90165	393,000 KW
Pacific	DE-MS79-81BP90168	140,000 KW
	TOTAL	1,269,000 KW

26. The Department did not treat Colstrip Unit 4 as construction work in progress in the 1986 ad valorem tax assessments, as a result of the representation of material facts by the Colstrip owners, as set forth above in Findings of Fact 12, 13, 14, 15, and 18.

27. But for the representation of material facts by the Colstrip owners concerning Colstrip Unit 4, the Department would have treated that property as construction work in progress in the 1986 ad valorem tax assessments.

28. The beneficial-use tax statute, 15-24-1203, MCA, is a privilege tax statute. Accordingly, the Department imposes beneficial-use taxes upon the taxpayer only if the taxpayer "beneficially used" otherwise tax-exempt facilities prior to the annual assessment date. Under Montana statutes, the assessment is midnight of January 1 (December 31) next preceding. 15-8-201, MCA.

29. In its 1983 session, the Montana Legislature amended 15-24-1203, MCA, in order to impose taxes upon "users" of federal electric power transmission facilities of 500 kV and higher. Appellants' electric utility property is centrally assessed by the Department.

30. The U.S. government, acting through the Bonneville Power Administration ("BPA"), owns, maintains, and operates "main grid" transmission facilities (i.e., 230-kilovolt ("kV") and 500-kV electric transmission facilities) in the "Pacific Northwest," which encompasses Oregon, Washington, Idaho, and Western Montana, as well as portions of Nevada, Utah, and Wyoming. 16 U.S.C. Section 838 (1982) (Pacific Northwest Federal Transmission System Act); 16 U.S.C. Section 839 (1982) (Pacific Northwest Electric Power Planning and Conservation Act).

31. Each of the Appellants has a separate contract with BPA for transmission services out of the Garrison Substation over BPA's main grid, which contracts are referred to as the "Garrison-West Contracts." Exhibit A-3 (Pacific); Exhibit A-6 (PGE); Exhibit A-5 (Puget Sound); Exhibit A-7 (Water Power); Exhibit A-2 (MPC).

32. The Department imposed beneficial-use taxes on all five Appellants for tax year 1984 on account of their beneficial use of the Townsend-Garrison federal 500-kV transmission facilities as of midnight, December 31, 1983. Appellants challenged this imposition on constitutional

grounds in Lewis and Clark County District court, which upheld the assessments. The Montana Supreme Court upheld the imposition of such beneficial-use taxes on the grounds that the Appellants' contract with BPA (Exhibit A-1) entitled them to firm transmission demands over the transmission lines as of the assessment date. Specifically, the Montana Supreme Court stated,

> In the present case, the Colstrip Owners *have an enforceable contract interest* which gives them the right to the beneficial use of firm (a guaranteed level of the available transmission capacity) megawatts of power transmitted over the Montana Intertie line. (773 P.2d 1181)

CONCLUSION

> The Owners *enjoyed a beneficial use interest* in the Montana Intertie Agreement 500 kV lines, which use we hold was properly taxable under Section 15-24-1203, MCA. That use was evidenced by the Owners' contractual reservation of firm transmission demands in the lines. (773 P.2d 1184)

33. In tax year 1985 the Department imposed beneficial-use taxes on PGE on account of PGE's alleged beneficial use of federal 500 kV transmission facilities between Hot Springs and the Idaho border as of midnight, December 31, 1984. PGE challenged those taxes in Lewis and Clark County District Court, which upheld the assessments. Again the Montana Supreme Court upheld their imposition because the Court determined that PGE had reserved transmission demands in the subject transmission facilities. The Court stated,

> To advance its commercial activities, and thereby increase profits, PGE contracted for firm transmission capacity over the BPA lines. This is an

> enforceable contract interest in firm megawatts of power. While PGE may not possess the lines, nonetheless, the power flowing through the lines remains under PGE's ownership. *Finally, PGE pays for the use of the lines regardless of the actual transmission flow.* We find the reservation firm transmission demand grants PGE an exclusive right taxable under Section 15-24-1203, MCA.

Portland General Electric Co. v. Department of Revenue, 773 P.2d 1189, 1193 (Mont. 1989). The Court concluded:

> Reviewing the facts, we conclude that the tax was imposed on the privilege of using the property. *The assessment reflects PGE's contractual reserve arrangement with the BPA, thereby ignoring actual (power) flows and the lines' west to east transmission capacity.*
>
> *Affirmed.*

34. The Garrison-Taft transmission facilities first became operational in November 1985, although those facilities did not become available for full, firm scheduling of Appellants' power west of Garrison until 2400 hours on January 23, 1986. BPA's March 17, 1986 power bill to Pacific provides:

> On January 23, 1986, @ 2400, Garrison-Taft was deemed ready for firm scheduling purposes, therefore the full transmission demands under the Garrison-West" (sic) wheeling agreement are to be billed effective then.

35. As of the assessment date for the 1986 tax year (midnight December 31, 1985), according to the Garrison-West Contracts then in effect, BPA was obliged to provide 330 MW of firm transmission services over its main grid

facilities west of Garrison, divided as follows: Pacific--32 MW (Def. Ex. 21, Rev. 1 to Ex. D, p. 2 of 10); PGE--65 MW (Def. Ex. 22, Rev. 1 to Ex. D, p. 1 of 4); Puget Sound--36 MW (Def. Ex. 23, Rev. 3 to Ex. D, p. 1 of 5); Water Power--197 MW (Def. Ex. 24, Rev. 2 to Ex. D, p. 1 of 3). However, the Garrison-Taft facilities had been in operation (although not deemed available for full, firm scheduling power) for two months in 1985. The Department assessed beneficial-use taxes on Pacific, PGE, Puget Sound, and Water Power.

36. As Chairman Rothwell pointed out, whether power produced is "test" or "commercial" power, it all sells the same:

> So, it wouldn't matter if you were (in) a test mode on the generators or the line or under full operation, it all sells the same, if it got down (to) the other end?
>
> MR. BRUSH: To the customer that it's going to, it would appear the same. (Tr. page 330)

37. The Department has treated generating plants--both Colstrip Unit 3 and Colstrip Unit 4--as "plant in service" as of the moment each commenced producing electricity. This is because, as Mr. Brush conceded in response to a question from Board Chairman Rothwell, all power produced at a generating plant is ultimately sold. Accordingly, the Appellants' income, and consequently the income approach, was affected *at the very moment that Colstrip Unit 3 or 4 commenced producing power.* Moreover, as Ms. Whittinghill testified on cross-examination, the stock-and-debt indicator *already* completely reflects the value of a plant that is producing power in a test mode.

38. Colstrip Unit #4 was a plant in operation in 1985. It produced and sold power starting:

a) Sept. 15, 1985: Mr. Brush;

b) October 1985; Owners, Exh. 203;

c) December 30, 1985; Owners, Exh. 194:

d) December 15, 1985; PGE, new industry application to the state;

e) Dec. 1 to Dec. 30, 1985: MPC, sale and leaseback agreement, claimed Colstrip Unit #4 operational;

f) Before December 15, 1985; Mr. Pederson, MPC deposition.

All these dates asserted above precede the effective date for classification for ad valorem tax purposes of midnight next preceding January 1, 1986.

The Department classed Colstrip Unit #4 as "plant in service" for 1985 (even though it felt it was CWIP for most, if not all, of that year.)

39. The Colstrip owners, under the terms under the terms of the Garrison-West Agreement (each having a separate contract with the BPA) were required to pay Intertie charges for the use of those lines as early as October 1983 even before power was available from Colstrip Unit #3. The transfer of energy was "deemed" to have occurred whether or not there was actual physical transmission. Therefore, the monthly charge was due BPA regardless of the actual transmission flow across the lines (See 773 P. 2d 1192-93).

The owners were paying for the reserved transmission capacity, a specific contractual right. The same right was

initiated when the lines were tied through for Garrison-West. No other parties could use the lines; the owners reserved more than the lines' capacity.

For Colstrip Unit #4, power was produced in 1985; 89,079 megawatt hours (under transmission for others) was noted in Exh. 5, p.401A.

On December 31, 1985 alone, Colstrip #4 produced 561 megawatt hours at 0100 hours; that is 80% of capacity and about the same amount as was produced on January 23, 1986 when owners (engineers) declared the lines available for scheduling.

40. Since the full amount of Colstrip Units #3 and #4 power could not be scheduled on a firm basis west of Garrison, the Colstrip owners entered into an interim transmission agreement. Its purpose was to make available most of the scheduling capacity west of the Garrison substation in order to ensure the transmission of Colstrip power through Garrison West.

Each Colstrip owner's Garrison West Agreement provided that test energy from Colstrip Units 3 and 4 would be delivered west of Garrison, pursuant to a non-firm transmission rate.

> "4. Test power from either Colstrip Unit No. 3 or No. 4 which may be made available for wheeling over the Federal System prior to their respective commercial operation dates shall be wheeled at the rate schedule contained in Exhibit F to the extent that the Company's Project Scheduled Power exceeds the applicable Transmission demand." (Puget Power Garrison West Agreement, Exhibit D, Pg. 2 of 5, Footnote 4, Exhibit 23.)

41. Mr. Brush (correcting his deposition answer) states:

> Okay, prior to Garrison-Taft being energized before the Nov. 4 and Nov. 5 dates, the four Colstrip participants (excluding the MPCo.) did have firm transmission rights under the, their Garrison-West contracts and those were laid out in the revision to those contracts in Exhibit D. (Tr. page 174)

42. Mr. Anasis:

> It (Garrison West #1 and #2) was released for commercial operation, for system operation on the dates I noted (Nov. 4 and 5, 1985)
>
> Q: What do they do with it when it's released?
>
> A: Well, at that point it's been declared that it's available for service, commercial service, and now we can officially schedule power across it and we can take it into account in our studies and so forth and develop transfer limits based on having that thing in service. . . and just basically use it as part of the operating power system. (Anasis deposition, pages 141-142, Exhibit 99)

43. Mr. Brush admitted that the lines (Garrison-West 1 and 2) were carrying power the last two months of 1985. In a memo he stated that Colstrip Unit #4 power was going to flow on the Garrison-Taft lines (Exhibit 190, page 19). "The power actually flowed in that line when it was tied through back in Nov. 4 or 5 of 1985." (Tr., page 328)

"The power you're moving across several transmission lines, or are parallel, will divide up based on the various

impedances of the lines," and the 500 kv lines has the least impedance to the flow of that power. (Tr., page 329)

44. Shortly after the Garrison-Taft lines were completed, Mr. Brush sent a memo to his system schedulers (Nov. 15, 1985) indicating that the net scheduling capacity with the west was increased from 800 mw to 1,000 mw. (Tr., page 320; also Brush deposition, Exhibits 11 and 189)

From Nov. 15, 1985 to Dec. 31, 1985, the increased non-firm capacity was schedule and billed according to the owners' Garrison-West contracts (Ex. F rate schedule). Non-firm power is "billed on a main grid basis for BPA which includes both 500 kv and 230 kv and depends on how far they have to move the power across their system to determine the charge. So I really couldn't say if it was going across the 500 kv lines or the 230 kv (in 1985). As soon as the Garrison-Taft 500 kv was tied through, Colstrip owner would have flowed across it." (Tr., page 627)

45. Mr. Brush was examined concerning a memorandum that he prepared on November 15, 1985.

> "Q. This seems to suggest that Garrison to Taft has been added to the system, doesn't it?
>
> A. It shows that its been energized and it's tied through. It doesn't say it's commercial.
>
> Q. Does this suggest that that increased the power transfer capability west of the Garrison Substation?
>
> A. Yes it did.
>
> . . .

Q. So there was an ability to schedule more power, including Colstrip power, after the Garrison-Taft lines were energized for that purpose?

A. Yes, there is.

Q. So that situation existed from November 15th, '85, through the end of the year, 1985?

A. I believe so.

. . .

Q. And so when you are suggesting more power capacity west of Garrison, are you suggesting that that is essentially non firm capacity?

A. That's correct.

Q. How was that non firm capacity billed to the Colstrip owners during the interim period, from November 15th, '85 to December 31, '85?

A. I would assume it would be billed under the non firm rate that's spelled out in the Colstrip participants' Garrison-West contracts." (Brush deposition, pages 58-60, Exh. 190).

46. The Department has determined that the reserve transmission demand in favor of each Colstrip owner pursuant to the agreements which they have with the BPA must be *the measure of the beneficial use tax interests.* (Tr., page 345).

The "full transmission demands" of owners (as employed by the Department and as referred to by the Montana Supreme Court) were used for the *purpose of allocating the beneficial use tax cost between the users.* Their taxable interests are reflected in the shares assigned with full, firm usage.

47. Robert G. Strong (Property Tax Supervisor, PP & L Co., in a March 28, 1986 letter to John Nicolay of the Department of Revenue) acknowledged: "The charges assessed against Pacific by Bonneville for bulk transfer services (1985) on the Bonneville power line were . . . $1,504,710 for the Townsend-Garrison segment and $574,745 for the Garrison-Taft segment." (Tr., page 637, also Book 2, Tab 3).

Edward P. Miska (PGE Co., in a March 31, 1986 letter to John Nicolay) stated: "Since the physical wheeling of energy is not specific as to which lines the energy transmits over, but rather the energy can be traveling over various lines as long as the final end result of delivery point is to where our contracts specify, PGE cannot proportion the exact service charges for the transmission lines in the State of Montana." (Exhibit 13).

48. The Department revised the 1986 and 1987 beneficial use assessments for the Colstrip owners. The revised assessments involved three segments of the transmission line system. Those segments included: the Townsend to Garrison segment (the Montana Intertie), the Garrison to Taft 500 kv system, and the Hot Springs to Idaho Border 500 kv facilities. The May 1988 revisions to the beneficial use assessments for 1986 and 1987 did have an effect on the Colstrip owners. The Townsend to Garrison beneficial use assessments were reduced for 1986 and 1987. The Colstrip owners received tax refunds from Powell, Broadwater and Jefferson Counties. The 1987 Garrison to

Taft beneficial use assessment changed slightly. (Exhibit 110).

49. The Colstrip owners did not produce any evidence that the Department's valuation methodology was erroneous. The Department moved for a summary ruling as a result of the failure of proof.

> "They have contention here on the revised assessment for 1986 for Garrison to Taft only. For the 1988 year, you have five consolidated appeals before you involving all three segments of the 500 kv transmission line system. You haven't a shred of proof on any of those issues, any methodology issue, anything in the 1988 appeals, not one shred of proof. In the 1989 tax appeal, you have a consolidated or joint appeal by the five Colstrip owners under docket number SPT-1989-4, again, there hasn't been any shred of proof about any methodological claim for anything on behalf of the Colstrip owners. They've rested their case at this point. *So I think the Board is in a position where it can issue a summary ruling at this point affirming the beneficial use taxes that have been posed upon the Colstrip owners for all of those segments of the line for all of those years because the Colstrip owners didn't put on any case.* They had no proof and at this point the Department is entitled to prevail.
>
> . . .
>
> MR. ROTHWELL: Yeah, these other two issues. I guess that's true. You have no argument with that acknowledgement?
>
> MR. NELSON: No, that's right.

MR. ROTHWELL: Alright, so we'll grant your motion on these two issues." Tr. pages 352-353, 356).

Since the State Tax Appeal Board granted a summary ruling in favor of the Department as to all other issues and claims in the consolidated appeals, the 1986, 1987, 1988, and 1989 beneficial use assessments were affirmed for all segments of the transmission line system in Montana, except for the Garrison to Taft portion in 1986.

50. The Board specifically rejects all proposed findings of fact not specifically adopted.

SUMMARY OF ARGUMENT

No evidence was presented to substantiate the assertion or belief that "beneficial use" only begins when: (a) full and firm scheduling begins; or (b) when the BPA or an engineer declares lines to be "commercially operational"; or (c) when CWIP ends as reported to FERC by the owners. Nothing in the Administrative Rules of Montana or the Montana Codes Annotated speaks to the initiation or triggering of the beneficial use privilege tax; these discuss the circumstances that warrant its application, i.e., usage plus contractual rights to that service.

A facility (generating plant or transmission lines), may be deemed to be in service for tax purposes and still not yet in commercial operation for contractual purposes; the power of the State of Montana to tax cannot be precluded by contractual arrangements between private parties.

Each owner's Garrison-West agreement provided that test power from Colstrip Units 3 and 4 would be delivered west of Garrison on a non-firm transmission rate. The owners' contracts with BPA take up all capacity not reserved to BPA. Once the Garrison-West lines were tied

through, those rights, whether implemented or not, whether effected episodically or continuously, are rights subject to tax.

Beneficial use is reflected in the right to firm, full transmission demands as noted by the Appellants. It is also reflected in occasional, sporadic transmission of non-firm quantities at a lower price. "Privilege" use is a property right; the owners had contractual rights to less than full demands.

The taxpayers' declaration, whether made by an engineer or a company officer, that "commercial operation" has begun establishes only the date when full and firm transmission demands shall begin. It does not establish the date for initiation of the beneficial use tax. Neither the price paid, nor the proportion of the capacity actually used, nor the fact that the transmissions are not continuous alter the fact that a beneficial use has been realized. That is not annulled merely by noting that full, firm transmission rights have not yet been realized.

In order to get "plant in service" acceptance from the IRS (for lower tax treatment), MPC successfully demonstrated that the plant was generating significant amounts of power prior to December 31, 1985. Absent the transmission capacity of Garrison-West lines #1 and #2, Colstrip Units #1 through #4 could not realistically operate simultaneously, as they did.

The owners pay for the use of the lines regardless of the actual transmission flow. The beneficial use tax is imposed on the privilege of using property, a right which began when the lines (Garrison-West #1 and #2) were "tied through."

The Department and the Montana Supreme Court do not say that less than full transmission use constitutes "no

use." There would be little point for the parties to agree to a price schedule for limited or sporadic transmission of power if in fact there was no usage except what is full and firm. The amount of that use may be in question but the fact of use is not.

The Garrison-West lines were constructed for the purpose of transmitting the owners' electrical power (and a slightly greater transmission capacity for BPA's power).

The owners' contracts gave me an enforceable interest in the injection and removal of power subject only to BPA's ability to transmit those amounts.

There are no other eligible users with a demonstrated need for transmission capability on the Garrison-West 500 kv lines.

The owners are liable for the total annual cost of the lines should there be no transmission of non-firm or BPA power, even if they do not use the lines.

The relationship between the construction/ completion of Colstrip Unit #4 and the availability of Garrison-West transmission lines #1 and #2 was extensively detailed by the respective parties, as indicated by the record, and thoroughly analyzed by the Board.

The Board was not persuaded that any of the sequential events concerning Colstrip Unit #4 (turbine roll, test operation, engineers' declarations of "plant in service", "plant in operation" "commercial operation", or full and firm power transmission), whether contractual or observational, had any causal relationship to the timing of beneficial use taxation on Garrison-West lines #1 and #2.

The date of initial beneficial use of Garrison-West lines #1 and #2 by the owners, although perhaps

incapable of precise determination was clearly and obviously at some time after Nov. 4 1985 and before midnight Dec. 31, 1985.

The owners have contractual rights to transmission demands; beneficial use began when the first line was tied through. The precise date is not important. The beneficial use was obtained from lines #1 and #2 when power began to flow through from any of the units at Colstrip (in which the owners had an enforceable contract.)

The Department, the Appellants and the Montana Supreme Court all agree that power flowed over lines #1 and #2 after the lines were tied through in November 1985.

As a result the owners are to be taxed for beneficial use for 1985 (the full year) even though power was distributed over the lines for only part of the year.

CONCLUSIONS OF LAW

1. The Colstrip owners properly invoked the jurisdiction of this Board concerning the revised 1986 Garrison to Taft beneficial use assessments, pursuant to 15-8-601, MCA.

2. The beneficial use tax was properly imposed on the utility owners' privilege of using federal transmission system (BPA) property that would otherwise be tax exempt. MCA 15-24-1203.

ORDER

The 1986 revised beneficial use tax assessments for the Garrison to Taft 500 kv facilities are hereby affirmed in all respects.

DATED this 30th day of August, 1990.

BY ORDER OF THE
STATE TAX APPEAL BOARD

s/ John J. McNaught
JOHN J. MCNAUGHT, Chairman

(SEAL)

s/ Patrick E. McKelvey
PATRICK E. McKELVEY, Member

s/ Norman E. Taylor
NORMAN E. TAYLOR, Member